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No. ___

IN THE

Supreme Court of the United States

STAFF SERGEANT ROBERT D. TIPPIT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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September 2007

QUESTIONS PRESENTED

Whether the military judge erred in finding there was a "De Facto Dismissal" of the charges against petitioner on 6 November 2001?

Whether the military judge erred in finding that Petitioner was not denied the right to a speedy trial under Article 10, UCMJ?

Whether Petitioner received ineffective assistance of counsel when his trial defense counsel did not inform him that an unconditional guilty plea waived the speedy trial issue under Rules for Courts-Martial (R.C.M.) 707?

Whether Petitioner's plea was improvident where it was entered upon the mistaken belief that his R.C.M. 707 speedy trial issue would be preserved for appeal?

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The petitioner, Staff Sergeant Robert D. Tippit, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on June 12, 2007.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Tippit*, 65 M.J. 69 (C.A.A.F. 2007), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals, *United States v. Tippit*, Misc. Dkt. 35624 (A.F. Ct. Crim. App. 14 July 2006) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on June 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867a(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution states in relevant parts:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...and to have the Assistance of Counsel for his defense.

Article 10, Uniform Code of Military Justice (UCMJ) Section 836(a) of Title 10, United States Code [hereinafter Article 10], provides:

> ...When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

STATEMENT OF THE CASE

This case presents the question of whether the military judge erred in finding there was 1) a "de facto dismissal" of the charges against Petitioner; 2) that Petitioner was not denied the right to a speedy trial under Article 10, UCMJ; 3) he received

effective assistance of counsel; and 4) his plea was provident. The Air Force Court of Criminal Appeals affirmed the approved findings and sentence. The Court of Appeals for the Armed Forces affirmed the Court of Criminal Appeals' judgment.

1. Facts

a. Background

On 21 November 2002, Petitioner was arraigned. From 8-9 January 2003, Petitioner was tried at a general court-martial at Peterson Air Force Base, Colorado. Petitioner entered pleas in accordance with his pre-trial agreement.

b. Charges and Dismissal

Charges were originally preferred against Petitioner on 6 September 2001. On 10 September 2001, the charges were "withdrawn" prior to referral and preferred again later that same day. App. Ex. 1, para 8. An additional charge was preferred on 10 October 2001. On or about 31 October 2001, the Air Force Office of Special Investigations (AFOSI) received search authorization to examine the contents of Petitioner's home computer. The same day AFOSI forwarded a request for a forensic media analysis of the computer to an agent in Shreveport, LA. App. Ex. XVII. This request indicated that, "Due to a legal mistake, SUBJECT

was brought onto active duty under the wrong orders and now his status must be approved by Secretary of the Air Force (SECAF). The legal office must now drop all charges and refile..." App. Ex. XVI; App. Ex. XVIII. This request was drafted by Special Agent Darryl Murphy for the OSI Detachment Commander's signature. Agent Murphy testified that he did not remember who told him that the charges had to be dropped and re-filed. R 194-95.

On 2 November 2001, 21 SW/JA forwarded a recommendation to 21 SW/CC to withdraw the charges. App. Ex. IV. This memo stated that:

> 2. . . . I recommend that the charges be withdrawn at this time. Information has come to the attention of the AFOSI through very reliable sources that significant weapons related offenses--a joint law enforcement investigation is ongoing--involving the subject and gun dealers. This conduct puts the offenses with which SSgt Tippet is charged into proper context. Withdrawing the charges now will not prohibit re-preferral at a later time--in approx three months as this

> investigation is completed. I have coordinated this recommendation with Colonel Moss, the 302d ARW/CC and 14 AF/JA.
>
> 3. Options: Pursuant to the RCM 404, as the special-court martial convening authority, you may: (1) Dismiss the charges. (2) Forward the charges to a subordinate commander for disposition. (3) Refer charges to a summary or special court-martial, or (4) Forward the Article 32 report with the charges, to the superior commander, 14 AF/CC, for disposition.

App. Ex. IV.

On 6 November 2001 the convening authority "withdrew" the charges and specifications, which had not yet been referred to trial. The legal office provided Petitioner's area defense counsel with a copy of the original charge sheet with all of the charges and specifications lined out and the word "WITHDRAWAL" written across them. App. Ex. V. The legal office did not provide Petitioner's area defense counsel with an explanation for the "withdrawal." *See* App. Ex. XXI, page 3, para. 39.

Petitioner was informed by a Major in the orderly room that the charges had been "dropped," and he was released from active duty and returned to Glendale, Arizona. R. at 89, 108. At this point, Petitioner and his defense attorneys believed that the case was over and done with and that there would be no future charges. R. at 109.

On 25 January 2002, Col Richard Moss, 302 AW/CC, requested that the 21st Space Wing Legal Office take responsibility for prosecution of the case, and on 30 January 2002, 21 SW/JA started the process to recall Petitioner to active duty to face court-martial charges. App. Ex. XXI, page 3, para. 43-44. On 1 February 2002, because the United States no longer had jurisdiction over Petitioner, who was a reservist, 21 SW/CC recommended that Petitioner be recalled to active duty to be prosecuted. On 5 February 2002, the recall package was forwarded through the chain of command to AFLSA/JAJM. On 8 February 2002, 14 AF/CC requested approval from the SECAF to recall Petitioner to active duty under Air Force Instruction 51-201, Administration of Military Justice, para 2.8.5, dated 2 November 1999. On 25 February 2002, the Judge Advocate General of the Air Force approved the recall and forwarded the recall package to the SECAF. App. Ex. XXX. On 23

May 2002, the SECAF approved the recall, and on 5 June 2002, 14 AF/CC recalled Petitioner to active duty. *See* App. Ex. II, para. 7-8. Charges were again preferred against Petitioner on 2 July 2002 and referred on 12 September 2002.

On 19 November 2002, the defense filed a motion to dismiss for lack of jurisdiction and denial of Petitioner's right to a speedy trial under Rule for Courts-Martial (R.C.M.) 707. R. at 17; App. Ex. I. The defense argued that the speedy trial clock began to run on 10 September 2001, such that, after taking applicable delays into account, 353 days had elapsed between 10 September 2001 and Petitioner's arraignment on 21 November 2002.

In their motion, the defense argued that because the 10 September 2001 charges were never referred, the charges could not have been withdrawn on 6 November 2001. App. Ex. I, para. 6. Instead, the only way to dispose of the charges would have been to dismiss them. R. 119-20; App. Ex. II, para. 7. Accordingly, the defense argued that the charges preferred against Petitioner on 10 September 2001 and 10 October 2001 were never dismissed, such that the speedy trial clock continued to run from 10 September 2001 until 21 November 2002. The defense argued that out of the 437 days that passed from 10 September 2001 until 21 November 2002,

only 83 days should be excluded, leaving a total of 353 days for speedy trial purposes. *See* App. Ex. I.

The government claimed that the charges were "withdrawn and dismissed" on 6 November 2001, and, therefore, the speedy trial clock stopped at that time. App. Ex. II, paras. 6, and 20. The government further argued that the speedy trial clock started over when Petitioner was returned to active duty on 7 June 2002. App. Ex. II, paras. 24, 43. Thus, the government argued that, in light of the days that were excluded, only 107 days passed for speedy trial purposes. App. Ex. II, para. 21, 24.

The defense countered that the government also did not have a valid reason to "dismiss" the charges. R. 119-25. The government's initial reason for "withdrawing" the charges was because there was supposedly an ongoing joint investigation with several federal agencies. Indeed, the Staff Judge Advocate (SJA) asserted in his 2 November 2001 memorandum to 21 SW/CC that the charges needed to be "withdrawn" because "[i]nformation has come to the attention of the AFOSI through very reliable sources that significant weapons related offenses--a joint law enforcement investigation is ongoing." App. Ex. IV. However, the defense argued this was merely a subterfuge because, as Special Agents

Mowry and Murphy testified, a "joint investigation" between the AFOSI and the Federal Bureau of Investigation (FBI) or, for that matter, any other federal agency never existed. R. at 174, 199-200, 205. Instead, there was simply "a level of cooperation" between the AFOSI, the FBI, and the Bureau of Alcohol, Tobacco and Firearms (ATF) where they shared information about Petitioner's case. R. at 174-75, 206.

The defense further argued that the government's real reason for attempting to "withdraw" the charges on 6 November 2001 was because the legal office realized that they did not get the required approval from the SECAF needed to ask that Petitioner receive a sentence that included confinement. R. at 123-24. The defense argued that, after the legal office realized their mistake, they purportedly "withdrew" the charges and then recalled Petitioner months later after getting proper SECAF approval. R. at 124-25. Thus, the defense argued that even if the government had actually dismissed the charges, they did not have a valid reason for doing so.

The military judge denied the defense motion, finding that "it was obvious . . . that the SJA meant to recommend the charges be dismissed." (R. at 245-49; App. Ex. XXI, page 8), and finding a "de

facto dismissal of the charges against the accused on or about 6 November 2001." App. Ex. XXI, page 11. The judge further found that "the dismissal of charges on 6 November 2001 was done for a legitimate reason." R. at 246. The military judge stated that:

> The charges had been preferred against the accused on 10 September 2001. The AFOSI Det/CC testified that the 10 September 2001 preferral took place while the investigation was "on-going," and that he updated the SJA with regard to this case on a regular basis. SA Murphy testified that he updated the Det/CC on a weekly basis. During the investigation, the AFOSI was not involved in a formal joint investigation with the FBI and/or ATF, but they were providing information they thought could be relevant to the other agencies' investigations. . . . Based on the references made by the SJA in his letter to the SPCM Convening Authority, he believed the AFOSI, FBI, and ATF were jointly working the investigation into the accused's

> actions. Again, he failed to recognize the significance of the term "joint federal law enforcement investigation."
>
> What is evident from the SJA's letter is that since charges were preferred on 10 September 2001, the AFOSI investigation had disclosed additional criminal behavior on the part of the accused. An additional charge was preferred on 9 [*sic*] October 2001. Additional updates were received by the SJA from AFOSI. At some point, the SJA recognized the preferral on 10 September 2001 had been premature. He then made the recommendation to dismiss the charges, with an eye toward re-preferral. When the investigation was completed, and the serious nature of the offenses could be properly reflected. This is appropriate under RCM 401(c)(1).

App. Ex. XXI, page 8.

The military judge further found that the speedy trial clock started on 7 June 2002 when Petitioner

was returned to active duty and that, after taking into account all applicable delays, only 104 days had elapsed for purposes of speedy trial. R. at 246-47. Accordingly, the military judge found no violation of R.C.M. 707. The military judge likewise found no violation of the Sixth Amendment or Article 10, UCMJ, noting:

> In the event it's later determined that my findings as to when the speedy trial clock started was erroneous and that the speedy trial clock began ticking when charges were preferred on 10 September 2001, or if it's determined that an Article 10 violation or a 6th Amendment violation occurred, I note that I did consider the facts that must be balanced against any prejudice to you pursuant to case law concerning Article 10 of the Uniform Code of Military Justice, types of violations, and 6th Amendment speedy trial violations; specifically those set forth in the case of *Barker v. Wingo*, which is a Supreme Court case from 1972. *Barker* requires that the following factors be subjected to a balancing test: The amount of time

or the length of delay it took the Government to get the case to trial. reasons for delaying the trial date. whether or not the accused—you in this case—asserted your right to a speedy trial. and the prejudice to an accused caused by any delays. When determining the prejudice to an accused. additional facts must also be considered. as set forth in the case of *U.S. v. Plants*. 62 M.J. 397 (C.A.A.F. 2005) and that's an Air Force case from 2002. The factors to consider in determining what interests of an accused the speedy trial right was designed to protect include the need. number one. to prevent oppressive pretrial incarceration; number two. to minimize the anxiety and concern of an accused; and number three. to limit the possibility that the defense would be impaired. The most serious is the last. and this is stated very clearly in the *Plants* case. because of the inability of an accused to adequately prepare his case skews the fairness of the entire system. Now taking all these factors into

> account. I would not have been able to find such significant prejudice to you that would have caused me to dismiss the case with prejudice. Therefore, the defense motion to dismiss based on a violation of your right to a speedy trial, under those three different rules, is denied.

R. at 247-49. The military judge further explained that in considering the *Barker v. Wingo* factors, the length of delay he considered was the time it took the government to get the case re-preferred after 6 November 2001. He stated that this amount of time was not unreasonable, that the reason for the delay was appropriate because new matters came to the attention of the AFOSI, and that the Petitioner was not prejudiced by the delay. App. Ex. XX, pgs 9-10.

2. Proceedings Below

The Air Force Court of Criminal Appeals ruled that the government had not denied the Petitioner's right to a speedy trial and that there was a "de facto dismissal" of the charges dismissed for a proper purpose. The Air Force Court also ruled that Petitioner was not denied effective assistance of counsel and his rights to a speedy trial under Article

10. UCMJ and the Sixth Amendment were not violated. The Court of Appeals for the Armed Forces affirmed the Court of Criminal Appeals' ruling.

REASONS FOR GRANTING THE WRIT

In its decision below, the United States Court of Appeals for the Armed Forces incorrectly concluded that Petitioner's speedy trial rights under Article 10, UCMJ, R.C.M. 707, and the Sixth Amendment were not violated. Furthermore, the lower court incorrectly concluded that Petitioner received effective assistance of counsel and his pleas were provident.

1. Dismissal and Speedy Trial

The original charges were "withdrawn" four days after they were preferred. There was no evidence that the convening authority concurred, or was even informed of the original charges. The original charges on 6 September 2001 started the speedy trial countdown. The convening authority purported to withdraw the unreferred 10 September 2001 charges against Petitioner on 6 November 2001. However, this action was invalid and "could not, as a matter of law, amount to a withdrawal of charges because there had not yet been referral of

those charges to a court- martial." *United States v. Robinson*, 47 M.J. 506, 509 (N.M. Ct. Crim. App. 1997).

Even if there had been a proper withdrawal, the withdrawal of charges does not stop or reset the R.C.M. 707 speedy trial clock. *United States v. Britton*, 26 M.J. 24, 26 (C.M.A. 1988). Thus, the government had to argue that the charges were "dismissed" on 6 November 2001. Otherwise, the speedy trial clock would have continued running from, 6 September 2001 until 21 November 2002, minus any applicable exclusions, and this inordinately lengthy period of time would undoubtedly have resulted in a dismissal of all charges and specifications under R.C.M. 707.

The military judge found that "it was obvious . . . that the SJA meant to recommend the charges be dismissed," R. at 245-49; App. Ex. XXI, page 8, and that there was a "de facto dismissal of the charges against the accused on or about 6 November 2001." App. Ex. XXI, page 11. This finding was erroneous for several reasons. First, the SJA's 2 November 2001 memorandum to the convening authority clearly stated that the government intended to withdraw the charges rather than dismiss them. In that memorandum, entitled, "Recommendation to **Withdraw** Charges," the SJA

stated, "I recommend that the charges be **withdrawn** at this time. . . . **Withdrawing** the charges now will not prohibit re-preferral at a later time—in approx three months as this investigation is completed." App. Ex. IV, para. 2. The closing paragraph recommends that the convening authority "authroize [*sic*] the SJA to **withdraw** the charges by lining through the charge sheet." App. Ex. IV, para. 4 (emphasis added). Then, the original charges and specifications were in fact lined through and the word "**WITHDRAWAL**" was written across them. App. Ex. V (emphasis added).

Similarly, in their motion at trial, the government repeatedly asserted that no dismissal had occurred. For example, in paragraph 16 of their response to the defense motion, the government stated, "Defense asserts an improper dismissal of charges. However, under the direction of the convening authority, the charges and specifications were **withdrawn**." App. Ex. II, para. 18 (emphasis added). Additionally, in paragraph 21, they stated that the "SPCMCA . . . **withdrew** the charges." (emphasis added). Then, throughout their motion, they repeatedly contended that the charges were "**withdrawn** and dismissed" on 6 November 2001. ("on 6 November 2001, the convening authority **withdrew** and dismissed the charges and specifications prior to referral"); ("On 5 November

2001, the convening authority directed the **withdrawal** and dismissal of the charges . . . the government **withdrew** and dismissed the charges against the accused . . . the very same day"); ("There was a significant break in time between when the charges were **withdrawn** and dismissed and when the accused was recalled to active duty") (emphasis added). Even at trial, they continued to argue "pre-referral withdrawal equals a dismissal." R. 236.

The fact that the government argued the charges were both withdrawn and dismissed does not convert an improper withdrawal into a proper dismissal. *United States v. Britton*, 26 M.J. 24, 26 (C.M.A. 1988), explained that there are "substantial differences" between withdrawal and dismissal of charges. Specifically, the court explained that dismissal:

> . . . contemplate[s] that the accused no longer faces charges, that conditions on liberty and pretrial restraint are lifted, and that he is returned to full-time duty with full rights as accorded to all other servicemembers. Reinstitution of charges requires the command to start over. The charges must be re-preferred, investigated, and referred

> in accordance with the Rules for Courts-Martial, as though there were no previous charges or proceedings.

26 M.J. at 26. Conversely, the court explained that, "... additional affirmative action will be taken by the convening authority after he withdraws charges." *See also United States v. Mickla*, 29 M.J. 749, 751 (A.F.C.M.R. 1989) ("Dismissal is thus an appropriate step when no further action against the accused is contemplated.")

In this case, it is clear that the charges were not "dismissed" because Petitioner continued to face charges. Indeed, the SJA stated in his 2 November 2001 memorandum that "[w]ithdrawing the charges now will not prohibit re-preferral at a later time—in approx three months as this investigation is completed." App. Ex. IV. Thus, at the time of the purported withdrawal, the government was fully aware that Petitioner still faced charges and planned to court-martial him in the near future.

In *United States v. Mickla*, 29 M.J. 749, 751 (A.F.C.M.R. 1989), the Air Force Court faced the same situation present here. In *Mickla*, the Air Force Court held that a purported dismissal of charges did not halt the running of the speedy trial

clock where the government dismissed the charges with the intention of continuing to trial on the same charges. The Air Force Court explained, "[a]pplicable Rules for Court-Martial contemplate that charges are properly dismissed when they fail to state an offense, when unsupported by available evidence, or when other sound reasons exist why trial by court-martial is inappropriate. *See* Discussion, R.C.M. 401(c)(1). Here, no such satisfactory reason exists." 29 M.J. 752. The lower court further explained that:

> The Government cannot have its military justice cake and eat it too. Here, it is patent that the convening authority never intended anything but a court-martial. Therefore, the concept of "dismissal" -- with its concomitant stopping of the sand in the speedy trial hourglass -- is inappropriate. Instead of a valid dismissal, the authorities . . . likely fabricated either a withdrawal or what the Navy-Marine Court of Military Review recently labeled *[sic]* as "more of an attempt to create a 'limbo' status for these charges" until such time as they could be perfected. *See United States v.*

> *Mucthison*, 28 M.J. 1113, 1115 (N.M.C.M.R. 1989). In either event, "freezing" the situation until one can get around to it is incompatible with R.C.M. speedy trial rules.

29 M.J. at 751.

No satisfactory reason to dismiss the charges existed. The reason given by the SJA for the purported withdrawal/dismissal of charges was that there was an ongoing "joint investigation." R. at 115, 120-23. However, as the defense demonstrated, this was not the case. R. at 120-23, 174, 199-200, 205. Indeed, even the military judge found that ". . . formal joint investigation did not exist between the AFOSI and either the FBI or the ATF with regard to this case...." App. Ex. XXI, para. 31.

The defense argued that the real reason the government attempted to "withdraw" the charges was because the government had not secured the proper approval necessary to ask for confinement for a reservist. R. at 136-37. Support is shown for this argument in the fact that the OSI Detachment Commander noted in the request for media analysis that, "Due to a legal mistake, SUBJECT was brought onto active duty under the wrong orders

and now his status must be approved by Secretary of the Air Force (SECAF). The legal office must now drop all charges and refile. . . ." App. Ex. XVI. para. 2; App. Ex. XVIII. para 2. The government denied this was the reason and claimed the charges were "withdrawn and dismissed" because AFOSI was still investigating further misconduct involving Petitioner. The military judge likewise found that the reason the charges were "dismissed" was because:

> ...since charges were preferred on 10 September 2001, the AFOSI investigation had disclosed additional criminal behavior on the part of the accused. An additional charge was preferred on 9 October 2001. Additional updates were received by the SJA from AFOSI. At some point, the SJA recognized the preferral on 10 September had been premature. He then made the recommendation to dismiss the charges, with an eye toward re-preferral when the investigation was completed, and the serious nature of the offenses could be properly reflected.

App. Ex. XXI, page 8.

These reasons do not negate that the invalid withdrawal was still not a valid dismissal. In *Britton*, the Court of Military Appeals explained, "when there is truly an effective dismissal of charges, all conditions or constraints on liberty are removed, charges are no longer pending, all pretrial restraint is lifted, the accused is returned to full duty, and the accused is provided with all rights and privileges of other uncharged servicemembers." 26 M.J. at 26. In this case, Petitioner was an Air Force reservist and was not in a position to simply be returned to active duty with all rights and privileges. However, it is important to note that Petitioner's reserve orders were not continued after the purported withdrawal, nor did he ever participate in any of his unit's training after the charges were preferred on 10 September 2001. *See* App. Ex. III. Thus, in the "context of a reservist, he was never returned to full time duty status." *Id.* Furthermore, it is clear that the government never intended to dismiss the charges because, as the SJA's 21 November 2001 memorandum makes clear, they always intended to prosecute Petitioner. App. Ex. IV. Accordingly, the military judge erred when he determined that the convening authority actually "dismissed" the preferred charges on 6 November 2001.

The dissent in the Air Force court's decision addresses the "withdrawal" of the original charges. *United States v. Tippit*, ACM 35624, 11 (A.F. Ct. Crim. App. 14 July 2006). The dissent points out that there was no evidence that the convening authority concurred with Capt D's withdrawal of the original charges. *Id.* Without the convening authority's concurrence, the withdrawal was not proper and was an error. Furthermore, the second Article 32, essentially a carbon copy of the first, relied on the evidence from the first Article 32 and cited the conclusions of the first investigating officer. Clearly, the government's actions were not consistent with an intent to dismiss charges, to include a new preferral, new investigation, and referral. The command was not required to start over. They simply picked up from where they "withdrew" the charges. There was no "de facto dismissal" or any other proper dismissal of the charges.

Unmistakably, the preferral of the original charges started the speedy trial clock. R.C.M. 707(a). *See also, United States v. Gray*, 26 M.J. 16, 20 (C.M.A. 1988). The speedy trial clock ran from 6 September 2001 until 21 November 2002, minus the applicable exclusions, such that 357 days passed for purposes of speedy trial. *See* App. Exs. I and VI. The military judge erred in finding that there was a "de

facto" dismissal and further erred when he found a legitimate reason existed for a dismissal.

Article 10, UCMJ, requires that, "[w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." A litigated speedy trial motion under Article 10, UCMJ is not waived by a subsequent unconditional guilty plea. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005). In *United States v. Kossman*, 38 M.J. 258, 261 (C.M.A. 1993), the predecessor to the Court of Appeals for the Armed Forces held that:

> [w]e happen to think that 3 months is a long time to languish in a brig awaiting an opportunity to confront one's accusers, and we think Congress thought so too. Four months is even longer. We see nothing in Article 10 that suggests that speedy-trial motions could not succeed where a period under 90- or 120-days is involved. At the same time, we recognize that there are many circumstances that justify even longer periods of delay. However,

> where it is established that the Government could readily have gone to trial much sooner than some arbitrarily selected time demarcation but negligently or spitefully chose not to, we think an Article 10 motion would lie.

In determining whether the facts of a given case constitute "reasonable diligence" under Article 10, the Court of Appeals for the Armed Forces has asserted that the four factors relevant to a Sixth Amendment speedy trial analysis – length of delay, reasons for delay, whether the accused requested a speedy trial, and prejudice to the accused – are an "apt structure" for the analysis. *United States v. Mizgala*, 61 M.J. at 127-29 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

In *Barker*, this Court offered guidelines for analyzing the speedy trial factors. This Court noted that whether a delay of a given length of time is inappropriate is "necessarily dependent upon the peculiar circumstances of the case." *Barker*, 407 U.S. at 530-31. As an example, this Court indicated that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Id.* at 531.

When evaluating the "reason the government assigns to justify the delay," this Court opined that

"different weights should be given to different reasons." Specifically, a

> ...deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government, rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Id. This Court noted that the "defendant's assertion of his speedy trial right...is entitled to strong evidentiary weight in determining whether the defendant is being deprived of that right." *Id.* at 531-32. Finally, this Court identified three interests leading to prejudice to a defendant. This Court concluded that it regarded "none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial"; consequently, the courts "must still engage in a difficult and sensitive balancing process. *Id.* at 533.

The government violates Article 10, UCMJ, and the Sixth Amendment when the record demonstrates that the government could have proceeded to trial much sooner, but "negligently or spitefully" failed to do so. *United States v. Kossman*, 38 M.J. 258, 261 (C.M.A. 1993). Article 10, UCMJ, requires the government to act with "reasonable diligence" to bring a confined accused to trial. *Id.* at 262. *See also United States v. Edmond*, 41 M.J. 419, 421 (C.A.A.F. 1995). Moreover, Article 10 "imposes a more stringent speedy trial standard than that of the Sixth Amendment." *Kossman*, 38 M.J. at 259 (citing *United States v. Burton*, 44 C.M.R. 166, 172 (C.M.A. 1971)).

In the present case, the defense primarily argued that Petitioner's right to a speedy trial under R.C.M. 707 was violated. However, the government, defense, and military judge all discussed Petitioner's speedy trial rights under the Sixth Amendment and Article 10, UCMJ, as well. In fact, the military judge's findings address all three speedy trial rules, finding no violation under R.C.M. 707, Article 10, UCMJ, or the Sixth Amendment. R. 248-49; App. Ex. XX, pages 9-10.

The military judge erred when he found that Petitioner's right to a speedy trial under Article 10, UCMJ, and the Sixth Amendment were not violated. The "touchstone" of an Article 10 analysis is whether the government acted with "reasonable diligence" in bringing a confined accused to trial, *Kossman*, 38 M.J. at 262, and the four *Barker v. Wingo* factors are instructive on determining whether the government has met its burden of proceeding with "reasonable diligence." *Birge*, 52 M.J. at 212. Analyzing the facts of this case in light of these four factors illuminates the violation of Petitioner's right to a speedy trial:

a. Length of the delay: The sheer length of time it took the government to get Petitioner to trial after the charges were preferred on 6 September 2001 establishes a lack of diligence on the part of the government. The charges were never properly withdrawn or dismissed thus, the speedy trial clock ran continuously from 6 September 2001 until Petitioner was arraigned on 21 November 2002, minus applicable exclusions, for a total of over 353 days. *See* App. Exs. I and IV.

b. The reason for the delay: The first reason given for the delay was because a joint investigation was pending. When that turned out not to be the case, the government then argued that the reason for the

delay was because OSI was investigating further charges. The defense presented substantial evidence that the real reason for the delay was so that the government could get permission to seek confinement – something they had initially forgotten to do. This is not a legitimate reason for the delay.

c. Petitioner's assertion of his right to a speedy trial: Petitioner made a demand for trial on 20 August 2001, while still in pretrial "restraint tantamount to confinement" and before the charges were even preferred. *See* App. Ex. I.

d. Whether Accused has suffered any prejudice caused by the delay: Both Petitioner and his wife testified about the prejudice the lengthy delay caused Petitioner. R. 69-111. The defense summed up the prejudice to Petitioner in its 19 November 2002 motion:

> Specifically, he was deprived of being with his wife during an operation she had for an ovarian cyst. He has also spent only a few months with his wife despite being married to her for more than a year. During the time charges were pending, SSgt Tippit's wife had their baby.

> Due to the stress of being deprived of her husband, and given uncertainties of SSgt Tippit's future, she was placed under an extraordinary amount of stress. This contributed to their baby being born prematurely and the baby has suffered from health problems ever since then. .... He had to leave the job he had when originally held in Colorado during 2001. Once he was allowed to return home he secured a promising job and was being groomed to take over part of the management of this business. This was all lost when the government required him to return to Peterson AFB, CO, and face his charges. ...

App. Ex. I, para. 11.

Petitioner's court was delayed for over 14 months so the government could court-martial him for offenses that are generally dealt with under Article 15, UCMJ. This included the addition of a charge of Petitioner wrongfully possessing an instrument purporting to be "Security Police" credentials, even

though he was a Security Forces noncommissioned officer. This charge, as the dissent in the lower court ruling pointed out, "does not, on its face, appear to be a serious offense -- if indeed it is an offense at all." *Id.*

Prejudice can come in many forms, including restrictions on Petitioner's liberty. *United States v. Dooley*, 61 M.J. 258, 264 (C.A.A.F. 2005) The military judge agreed that Petitioner was subjected to "punitive" conditions of restraint while awaiting trial. Due to the conditions of restraint the military judge credited Petitioner with that time at sentencing. Furthermore, as stated in the lower court's dissent, Petitioner was also prejudiced by his loss of his civilian job while being kept at Peterson AFB awaiting trial. *Tippit*, ACM 35624, 11 (A.F. Ct. Crim. App. 14 July 2006). The dissent, from Judge Erdmann, in the Court of Appeals for the Armed Forces decision concluded that the Government failed to act with due diligence to bring Petitioner to trial and that he was prejudiced by the delay in violation of Article 10, UCMJ. *Tippit*, 65 M.J. 69 (C.A.A.F. 2007). The government violated the petitioner's right to a speedy trial under R.C.M. 707, Article 10, and the Sixth Amendment. Dismissal of all charges and specifications with prejudice was the appropriate remedy.

2. Ineffective Assistance of Counsel and Providency of Plea

The Sixth Amendment guarantees an accused the right to "effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). The same right is afforded servicemembers in trial by courts-martial under Article 27(b), UCMJ; *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991). In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), this Honorable Court set out a two-part test to determine whether a conviction should be set aside on grounds that an petitioner's trial defense counsel was ineffective. First, the petitioner must show that his counsel's performance was deficient, and, second, the petitioner must show that he was prejudiced by the deficient performance. *See* 466 U.S. at 687. To satisfy the second prong of the test, the petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

"A criminal defendant who obtains relief under *Strickland* does not receive a windfall; on the contrary, reversal of such a defendant's conviction is necessary to ensure a fair and just result." *Kimmelman v. Morrison*, 477 U.S. 365, 393 (1986) (Powell, J., concurring in the judgment).

In this case. Petitioner asserts that his defense counsel did not advise him that his unconditional guilty plea waived the speedy trial issue under R.C.M. 707. Petitioner argues that the failure to properly advise him of the consequences of his guilty plea and the failure to pursue a conditional guilty plea prejudiced him because he had a good chance of prevailing on the R.C.M. 707 issue.

Under R.C.M. 707(a). the government must bring an accused to trial within 120 days after the earlier of the preferral of charges or the imposition of pretrial confinement. Pretrial delays approved by a military judge or the convening authority are excluded under the 120-day rule. R.C.M. 707(c). The remedy for a violation of speedy trial under R.C.M. 707 is dismissal of the charges. either with or without prejudice. R.C.M. 707(d). The charges must be dismissed with prejudice where the accused has been deprived of his constitutional right to a speedy trial. In this case. there was a clear violation of Petitioner's right to speedy trial under R.C.M. 707. The speedy trial clock started on 6 September 2001 and ran until Petitioner was arraigned on 21 November 2003. for a total of over 437 days. App. Ex. I. Even after applicable delays. over 353 days passed for purposes of speedy trial. App. Ex. I. Thus. Petitioner's right to a speedy trial under

R.C.M. 707 was clearly violated, and the charges should have been dismissed. Trial defense counsel failed to address the "withdrawal" of the 6 September 2001 charges and the errors surrounding that withdrawal. Petitioner argues that the four factors enumerated in R.C.M. 707, demonstrate that dismissal of the charges should be with prejudice. None of the charges against Petitioner were particularly serious, as demonstrated by the amount of confinement time the military judge adjudged and credited with pretrial confinement credit. R. 376. The sheer length of this delay, for which the government had no legitimate reason, would have been the reason for the dismissal. As the Air Force court's dissent makes clear, "Having preferred charges against the appellant no less than four times already, the government should not rightfully be heard to complain about being denied a fifth bite at the apple. Nor would there be any negative impact on the administration of justice in bringing this case, finally, to a close." *Tippit*, ACM 35624, 15 (A.F. Ct. Crim. App. 14 July 2006). Lastly, as discussed above Petitioner suffered extreme prejudice by the lengthy delay.

After balancing the factors set forth in R.C.M. 707, Petitioner avers that it is clear the charges should have been dismissed with prejudice. Thus, Petitioner asserts that he received ineffective

assistance of counsel because his defense counsel did not advise him that his guilty plea waived the issue under R.C.M. 707. Petitioner's counsel also mentioned, but failed to focus, the motion to dismiss on not only R.C.M. 707 but also Article 10, UCMJ. Furthermore, Petitioner received ineffective assistance of counsel because his trial defense counsel should have raised the issue regarding the errors surrounding the "withdrawal" of the 6 September 2001 charges. Petitioner's counsel was also ineffective for their performance, or, more accurately, lack thereof, in handling the speedy trial issues, the meat of Petitioner's case.

"An accused must possess a correct understanding of the law in relation to the facts of his case in order that his plea of guilty be considered provident and voluntary." *United States v. Peters*, 11 M.J. 875, 876 (N.M.C.M.R. 1981) (citing *United States v. Care*, 40 C.M.R. 247 (1969); *United States v. Cordova*, 4 M.J. 604 (A.C.M.R. 1977)). "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 US 742, 756 (1970) (citations omitted). A plea is improvident when it is premised on the erroneous assumption that the guilty plea would not waive

appellate review of an issue. *See United States v. Higa*, 12 M.J. 1008 (A.C.M.R. 1982).

Petitioner argues that he was unaware that his plea of guilty waived his right to raise the R.C.M. 707 motion on appeal. He points out that that the military judge apparently expected the issue to be reviewed on appeal, as demonstrated by his statement that he also considered the speedy trial issue under Article 10, UCMJ, and the Sixth Amendment "[i]n the event it's later determined that my findings as to when the speedy trial clock started was erroneous and that the speedy trial clock began ticking when charges were preferred on 10 September 2001. . . ." R. 248. Then, after Petitioner entered pleas of guilty, he notes that the military judge never informed him that his guilty pleas waived the R.C.M. 707 issue. Petitioner asserts that the defense counsel's failure to inform Petitioner of the consequences of his plea, coupled with the above-noted statement by the military judge and the judge's corresponding failure to inform Petitioner of the consequences of his pleas, rendered Petitioner's pleas improvident because he did not understand that pleading guilty waived the R.C.M. 707 issue on appeal. Under these circumstances, Petitioner avers that his plea was not knowing and voluntary.

CONCLUSION

Petitioner was denied his right to a speedy trial under R.C.M. 707, Article 10, and the Sixth Amendment. Furthermore, Petitioner was denied his Sixth Amendment right to effective assistance of counsel. The ineffective assistance of counsel he received failing to inform him that his pleas would waive the R.C.M. 707 speedy trial issue rendered his pleas improvident. The military judge, the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces denied Petitioner's constitutional rights to a speedy trial and effective assistance of counsel. The petitioner therefore respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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September 2007

Appendix A

UNITED STATES, Appellee

v.

ROBERT D. TIPPIT,

Airman Basic U.S. Air Force,

Appellant

65 M.J. 69

United States Court of Appeals for the Armed Forces

Argued February 28, 2007

Decided June 12, 2007

EFFRON, C.J., delivered the opinion of the court, in which BAKER, J. and STUCKY, JJ., joined. RYAN, J., filed a separate opinion dissenting in part, concurring in part, and concurring in the result. ERDMANN, J., filed a dissenting opinion.

Counsel

For Appellant: Captain Vicki A. Belleau (argued); Lieutenant Colonel Mark R. Strickland.

For Appellee: Captain Captain Donna S. Ruppell (argued); Colonel Gerald R. Bruce and Major Matthew S. Ward (on brief); Lieutenant Colonel Robert V. Combs.

Military Judge: Kurt D. Schuman.

Judge EFFRON delivered the opinion of the Court.

A general court-martial composed of a military judge sitting alone convicted Appellant, pursuant to his pleas, of dereliction of duty, violation of a lawful general regulation, filing a fraudulent reimbursement claim, and wrongful possession of United States Air Force Security Police credentials to the prejudice of good order and discipline, in violation of Articles 92, 132, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 932, 934 (2000). The sentence adjudged by the court-martial and approved by the convening authority included a bad-conduct discharge, confinement for forty-

seven days, and reduction to the grade of E-1. The United States Air Force Court of Criminal Appeals affirmed. *United States v. Tippit*, No. ACM 35624, 2006 CCA LEXIS 186, 2006 WL 2269204 (A.F. Ct. Crim. App. July 14, 2006) (unpublished).

On Appellant's petition, we granted review of four issues related to the litigation of the speedy trial motion at Appellant's court-martial. [1]

[1] We granted review of the following issues:

I. WHETHER THE MILITARY JUDGE ERRED IN FINDING THERE WAS A "DE FACTO DISMISSAL" OF THE CHARGES AGAINST APPELLANT ON 6 NOVEMBER 2001 THAT WAS DONE FOR A LEGITIMATE REASON.
II. WHETHER THE MILITARY JUDGE ERRED IN FINDING THAT APPELLANT WAS NOT DENIED THE RIGHT TO A SPEEDY TRIAL UNDER ARTICLE 10, UCMJ.
III. WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE COUNSEL

DID NOT INFORM HIM THAT AN UNCONDITIONAL GUILTY PLEA WAIVED THE SPEEDY TRIAL ISSUE UNDER R.C.M. 707.

IV. WHETHER APPELLANT'S PLEA WAS IMPROVIDENT WHERE IT WAS ENTERED UPON THE MISTAKEN BELIEF THAT HIS R.C.M.707 SPEEDY TRIAL ISSUE WOULD BE PRESERVED FOR APPEAL.

For the reasons set forth below, we hold that Appellant has not demonstrated error with respect to speedy trial, the effective assistance of counsel, or the providency of his plea.

I. BACKGROUND

A. THE INITIAL CHARGES

Appellant, a member of the Air Force Reserve, performed inactive duty training at Peterson Air Force Base, Colorado. On June 11, 2001, the last scheduled day of his inactive duty training tour, Appellant prepared to return to civilian life. He parked his truck near the Security Forces office, his duty location. At that time, Security Forces personnel were conducting an exercise, and a dog trained in bomb detection

alerted on Appellant's truck. Appellant consented to a search of the vehicle, which yielded a cache of firearms, ammunition, and related items. The search led to an investigation by the Air Force Office of Special Investigations (AFOSI).

Appellant's tour of duty was extended, and he was placed under restriction until August 1, 2001. During the period of restriction, he was first restricted to the base, and subsequently to the confines of the surrounding county. As a result of his extended tour of duty and period of restriction, he could not return to Arizona where he maintained his home and held a civilian job. On August 20, 2001, while the investigation continued, he requested a speedy trial.

Although both parties indicate that charges were first preferred against Appellant on September 6, 2001, the record does not contain the charge sheet, nor does it contain documentation of an official disposition of any such charges. During subsequent litigation at trial, the prosecution indicated that the September 6, 2001 charges were "withdrawn" shortly after preferral, on September 10, 2001, because of an unspecified "administrative error." The defense did not litigate the content or disposition of the

September 6 charges at trial. Although Appellant has alleged that the trial defense team was ineffective for not addressing the September 6 charges, see infra Part III.B.1., his appellate submissions do not provide further information about the content or disposition of the September 6 charges, nor do such submissions allege that government personnel involved in the processing of such charges were unwilling or unable to provide such information during the appellate proceedings.

The first charge sheet that appears in the record of trial contains charges preferred on September 10, 2001. That charge sheet also documents an additional charge preferred on October 10, 2001.

B. DISPOSITION OF THE CHARGES PREFERRED ON SEPTEMBER 10, 2001, AND OCTOBER 10, 2001

On September 11, 2001, the Special Court-Martial Convening Authority ordered an investigation under Article 32, UCMJ, 10 U.S.C. § 832 (2000). As a result of force protection conditions surrounding the national events of September 11, 2001, the investigation was delayed for a week. The defense requested

and was granted further delays until October 10, 2001. The Article 32 hearing, which began on October 10 and ended on October 12 considered the charges preferred on September 10, as well as the additional charge preferred on October 10. The Article 32 investigating officer submitted his report to the Special Court-Martial Convening Authority on October 24, 2001. The report recommended trial by general court-martial on the charges that had been preferred on September 10 and October 10.

While the Article 32 investigating officer's recommendation was awaiting disposition by the Special Court-Martial Convening Authority, the AFOSI conducted a further investigation, including a search of Appellant's home computer. On October 31, 2001, an AFOSI agent requested a forensic analysis of the computer by another AFOSI office. The agent included the following notation in the request: "[d]ue to a legal mistake, SUBJECT [Appellant] was brought onto active duty under the wrong orders and now his status must be approved by SECAF [Secretary of the Air Force]. The legal office must now drop all charges and refile (the original Article 32 has already been completed)."

On November 2, 2001, the staff judge advocate (SJA) provided the Special Court-Martial Convening Authority with a memorandum regarding Appellant's case entitled "Recommendation to Withdraw Charges." After noting the Article 32 investigating officer's recommendation for trial by general court-martial, the SJA recommended that "the charges be withdrawn at this time." The SJA stated that "a joint federal law enforcement investigation is ongoing," that AFOSI had developed information from "very reliable sources" about "significant weapons related offenses" involving Appellant "and gun dealers," and that this information would put the charged offenses "into proper context." The SJA added: "[w]ithdrawing the charges now will not prohibit re-preferral at a later time -- in approx [sic] three months as this investigation is completed."

Citing Rule for Courts-Martial (R.C.M.) 404, the SJA provided the Special Court-Martial Convening Authority with four options: "(1) Dismiss the charges. (2) Forward the charges to a subordinate commander for disposition. (3) Refer charges to a summary or special court-martial, or (4) Forward the Article 32 report with the charges, to the superior commander . . .

for disposition." The SJA recommended that the convening authority authorize the SJA "to withdraw charges by lining through the charge sheet." The convening authority wrote "concur" and his initials on the memorandum. On November 6, 2001, the SJA lined out all charges and specifications on the charge sheet, adding the word "withdrawn," as well as his name and the date, near the lines.

C. ACTIONS FOLLOWING DISPOSITION OF THE SEPTEMBER 10, 2001, AND OCTOBER 10, 2001, CHARGES

Shortly thereafter, the group support commander informed Appellant that the charges had been "dropped." The legal office provided defense counsel with a copy of the charge sheet with the September 10, 2001 and October 10, 2001 charges lined out. The legal office did not provide defense counsel with a reason for this action. Defense counsel showed the document with the lined out charges to Appellant and told him that the charges had been dismissed. On November 6, 2001, the same day that the charges were lined out, Appellant was released from active duty and permitted to return to his home in Arizona. AFOSI continued its

investigation, but no constraints were placed upon Appellant's resumption of civilian life.

D. THE 2002 CHARGES

In January 2002, the command initiated a request to recall Appellant to active duty to face charges. The Secretary of the Air Force approved the request on May 23, 2002, and Appellant reported for duty on June 7, 2002. AFOSI released its final investigative report on June 28, 2002. New charges were preferred on July 2, 2002. The 2002 charges were substantially the same as the charges preferred on September 10, 2001 and October 10, 2001, with the addition of two new specifications alleging violations of a federal firearms statute, 18 U.S.C. § 922 (2000).

On July 15, 2002, the Special Court-Martial Convening Authority ordered a new investigation under Article 32 and appointed a new investigating officer. The investigating officer relied on material from the prior Article 32 proceedings, as well as information developed in the new Article 32 hearing. The investigating officer reviewed and incorporated a substantial amount of the information from the

prior Article 32, with certain modifications and without objection by the defense, which had offered to waive the Article 32 proceeding.

The investigating officer issued her report on August 15, 2002, recommending trial by general court-martial. The Special Court-Martial Convening Authority approved and forwarded the recommendation for trial by general court-martial. The General Court-Martial Convening Authority referred the charges to a general court-martial on September 21, 2002.

E. APPELLANT'S SPEEDY TRIAL MOTION

1. *Options for litigating speedy trial issues*

In the present appeal, the parties have addressed the right to a speedy trial under three different sources of law constitutional, statutory, and regulatory. The constitutional standard provides that the accused in a criminal prosecution "shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. The Supreme Court has established a four-part test for assessing whether a delay amounts to a Sixth Amendment constitutional violation. Barker v. Wingo, 407 U.S. 514, 530 (1972) (requiring a balancing of the length of the delay, reasons for the delay, whether the

appellant demanded a speedy trial, and any prejudice to the appellant from the delay); see also United States v. Grom, 21 M.J. 53, 56-57 (C.M.A. 1985) (applying the Barker factors to an alleged Sixth Amendment speedy trial right violation). In addition to the Sixth Amendment, timely processing also is subject to assessment under the Due Process Clause of the Fifth Amendment. See United States v. Reed, 41 M.J. 449, 451-52 (C.A.A.F. 1995). The defense has not alleged a due process violation in the present appeal.

The statutory standard, Article 10, UCMJ, 10 U.S.C. § 810 (2000), provides that "[w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." See also United States v. Powell, 2 M.J. 6, 7-8 (C.M.A. 1976) (describing circumstances under which certain forms of restriction may trigger the protections of Article 10). Article 10 provides "a more exacting speedy trial" standard than the Sixth Amendment. United States v. Mizgala, 61 M.J. 122, 124-25 (C.A.A.F. 2005). The standard under Article 10 for assessing the Government's actions "is not constant motion.

but reasonable diligence in bringing the charges to trial." Id. at 127 (citation and quotation marks omitted). Although Article 10 establishes a more stringent standard than the Sixth Amendment, we have relied on the Supreme Court's four-part test from Barker v. Wingo to evaluate Article 10 claims. See United States v. Birge, 52 M.J. 209, 212 (C.A.A.F. 1999).

The regulatory standard set forth in R.C.M. 707 requires that an accused be brought to trial within 120 days of preferral of charges, imposition of restraint, or entry onto active duty, whichever is earliest. R.C.M. 707(a). An accused is "brought to trial" within the meaning of the Rule at arraignment. R.C.M. 707(b)(1); R.C.M. 904. If charges are dismissed, the clock stops and a new 120-day period begins upon re-preferral of charges. R.C.M. 707(b)(3)(A)(i).

2. *Appellant's R.C.M. 707 motion at trial*

On November 19, 2002, prior to arraignment, the defense moved to dismiss all of the charges based upon a violation of Appellant's right to a speedy trial pursuant to the 120-day standard set forth in R.C.M. 707. The defense motion noted that the Sixth Amendment provides an accused

with the right to a speedy trial, but did not explain how the processing of Appellant's case violated the Sixth Amendment. The defense did not allege a violation of Appellant's speedy trial right under Article 10.

With respect to R.C.M. 707, the defense focused its attention on September 10, 2001, as the date on which "the speedy trial clock began." The defense did not allege that the clock began to run with the September 6, 2001 charges or that there had not been a proper disposition of the September 6 charges.

The defense contended that the speedy trial clock had run continuously since September 10, 2001, taking the position that the command had improperly "withdrawn" the charges in November 2001. According to the defense, the improper withdrawal did not result in a dismissal of charges required to stop the speedy trial clock under R.C.M. 707(b)(3)(A)(i).

The defense focused on use of the word "withdrawal" on the charge sheet and in the SJA's November 2, 2001, recommendation to the convening authority. The defense noted that the word "withdrawal," as used in the Manual for Courts-Martial, refers to the act of removing

charges from a court- martial after referral of those charges to court-martial. See R.C.M. 604. Because charges withdrawn from a court-martial remain in effect and may be referred to another court-martial under the circumstances set forth in R.C.M. 604(b), the act of withdrawal under R.C.M. 604 does not result in dismissal of the charges. The defense added that because the September 10, 2001 and October 10, 2001 charges had never been referred to a courtmartial, and thus could not be "withdrawn," they remained in effect for more than 400 days, thereby violating the 120-day limit established by R.C.M. 707.

The defense further contended that the action of the convening authority did not stop the speedy trial clock because the Government had not demonstrated a legitimate reason for dismissing the charges. The defense focused on the October 31, 2001, AFOSI request for a forensic analysis of Appellant's computer, which contained the following comment:

> SUBJECT has been brought on active duty and confined to base pending completion of this investigation. Due to a legal mistake, SUBJECT was brought onto active duty under the wrong orders

> and now his status must be approved by SECAF [the Secretary of the Air Force]. The legal office must now drop all charges and refile. . . .

According to the defense, the AFOSI document demonstrated that the SJA's stated reason for recommending dismissal of the 2001 charges -- an ongoing joint military-civilian investigation -- merely served as a subterfuge to buy time so that the Government could correct Appellant's orders. The defense also attacked the factual basis for the SJA's statement that there was a joint investigation, or even an ongoing investigation, by relying on AFOSI agents testimony that there were concurrent, but separate investigations and by endeavoring to show that nothing substantially new was discovered after the "withdrawal" of the charges in November 2001. The defense contended that the SJA was simply trying to "rationalize" the delay.

3. *The military judge's ruling on the speedy trial motion*

The military judge entered extensive findings of fact and conclusions of law in the course of ruling on the defense speedy trial motion. The

military judge found that there was no R.C.M. 707 violation because the speedy trial clock had been stopped by the dismissal of the charges by the Special Court-Martial Convening Authority on or about November 6, 2001. The military judge relied upon the fact that the SJA had informed the convening authority correctly of his disposition options under R.C.M. 404, including dismissal, forwarding the charges to a subordinate commander, referring the charges to a summary or special court-martial, or forwarding the charges to a superior commander. The military judge cited a number of actions that he viewed as consistent with the choice of dismissal: the concurrence of the convening authority with the recommendation of the SJA to withdraw the charges, "the act of lining out all of the charges and specifications, notification to the accused that the charges had been 'dropped,' and the release of the accused from active duty."

The military judge concluded that the SJA had not used the word "withdrawal" in his November 2, 2001 memorandum to recommend withdrawal of charges under R.C.M. 604. The military judge observed that withdrawal under R.C.M. 604 was possible only after charges had been referred to trial, and that the charges in the

present case had not been referred to a courtmartial at the time of the SJA's memorandum. The military judge concluded that there was no basis to assume that the SJA intended to recommend that the convening authority undertake the impossible act of withdrawal of the charges under R.C.M. 604 prior to referral. On the contrary, the SJA's intent to recommend dismissal under R.C.M. 404, not withdrawal under R.C.M. 604, was evident both from his proper citation of dismissal as one of the convening authority's options under R.C.M. 404, and from the contemplation of re-preferral of the charges in the future, an act that would have been unnecessary if the charges had been withdrawn, but not dismissed, under R.C.M. 604.

The military judge further found that there was a legitimate reason for the dismissal -- to allow for the completion of the ongoing investigation. Because the 2001 charges had been dismissed for a legitimate reason, the military judge found that the speedy trial clock did not restart until June 7, 2002, when Appellant reported for duty. He calculated that 104 days elapsed from that date to arraignment on the 2002 charges. Accordingly, he concluded that Appellant's

right under R.C.M. 707 to be brought to trial within 120 days had not been violated.

Although the defense had not alleged a violation of Appellant's speedy trial right under Article 10, the military judge addressed Article 10 on his own motion in conjunction with his ruling on Appellant's Sixth Amendment claim. The military judge concluded that the Government had proceeded with reasonable diligence, and that any delays did not result in constitutional or statutory prejudice.

4. *Appellant's unconditional guilty plea*

Appellant subsequently entered an unconditional guilty plea. After conducting an inquiry into the providence of the plea, the military judge entered findings of guilty.

II. WAIVER

Under R.C.M. 707(e), an unconditional "plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense" under the Rule. Such a plea also waives any speedy trial issue as to that offense under the Sixth Amendment. See Mizgala, 61 M.J. at 125. In the present case, Appellant's unconditional guilty

plea waived his speedy trial rights under R.C.M. 707 and the Sixth Amendment. We shall consider them only to the extent that they bear on the granted issues concerning ineffective assistance of counsel and the providence of Appellant's plea. See infra Parts III and IV.

In Mizgala, we concluded that Article 10 provides a narrow exception to the normal rule that a speedy trial motion is waived by an unconditional guilty plea. 61 M.J. at 126. Noting the "unique nature of the protections" set forth in Article 10 and the special role of Article 10 in promoting efficiency in the military justice system, we held that "a litigated speedy trial motion under Article 10 is not waived by a subsequent unconditional guilty plea." Id. at 127 (emphasis added). We further held that "Mizgala's unconditional guilty plea did not waive his right to contest the military judge's denial of his Article 10 motion on appeal." Id. (emphasis added). In short, a servicemember who enters an unconditional guilty plea may appeal a speedy trial claim under Article 10 only if the accused has invoked Article 10 at trial by filing and litigating an Article 10 motion at trial. Requiring a litigated Article 10 motion fosters the prompt disposition of military justice cases

by promoting the development of an adequate record at trial on the issues required to be addressed under Article 10. Mizgala provides no authority for an accused to disregard Article 10 in favor of other bases for a speedy trial motion, plead guilty, and then attempt to raise an Article 10 violation on appeal.

Here, the Appellant did not make a motion under Article 10 at trial and did not litigate the speedy trial motion he did make under Article 10. Appellant focused his motion and arguments on the requirements of R.C.M. 707, with an occasional broad reference to the Sixth Amendment. The military judge briefly addressed Article 10 on his own motion, not because it was raised or litigated by the defense. In that context, the military judge did not articulate detailed findings for Article 10, which had not been raised or litigated by the defense. Instead, the military judge focused narrowly on the question of whether there had been any prejudice to the defense from the length of time it took to bring him to trial, without making the type of specific findings on the nature of restraint and processing of the case that normally would have accompanied a litigated Article 10 motion. The ruling reflects the actions of a military judge who sought to

address briefly a potential issue, not the actions of a military judge presiding over a litigated Article 10 motion. We note that although Appellant does not concede that the Article 10 issue was waived, he asserts trial defense counsel were ineffective in that they did not "focus" the motion to dismiss on Article 10. Because the defense did not make the requisite Article 10 motion at trial, any issue with respect to Article 10 was waived. See Mizgala 61M.J. at 127; see also United States v. Sloan, 22 C.M.A. 587, 590, 48 C.M.R. 211, 214 (1974) (concluding that failure to raise the issue at trial waives the Article 10 right). We shall consider Article 10 only to the extent that it bears upon the granted issues concerning ineffective assistance of counsel and the providence of Appellant's plea. See infra Parts III and IV.

III. ASSISTANCE OF COUNSEL

Appellant claims that his trial defense team was deficient in the following respects: (1) failure to challenge the disposition of the initial charges filed on September 6, 2001; (2) failure to advise him that an unconditional guilty plea would waive appellate consideration of his R.C.M. 707 speedy trial claim, and of the possibility of entering a conditional guilty plea to preserve the

issue; and (3) failure to focus the speedy trial claim on Article 10. The Government disputes factual and legal aspects of Appellant's claims.

A. STANDARD OF REVIEW

Members of the armed forces are entitled to the effective assistance of counsel. United States v. Scott, 24 M.J. 186, 187-88 (C.M.A. 1987); see U.S. Const. amend. VI; Article 27(b), UCMJ, 10 U.S.C. § 827(b) (2000). We review claims of ineffective assistance of counsel de novo. United States v. Perez, 64 M.J. 239, 243 (C.A.A.F. 2006).

An appellant who alleges ineffective assistance of counsel "must surmount a very high hurdle." Id. (citations and quotation marks omitted). As the Supreme Court has emphasized, a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. 668, 689 (1984).

To overcome the presumption of competence, an appellant must demonstrate: (1) "a deficiency in counsel's performance that is 'so serious that counsel was not functioning as the "counsel"

guaranteed the defendant by the Sixth Amendment'"; and (2) that the deficient performance prejudiced the defense through errors "'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" United States v. Moulton, 47 M.J. 227, 229 (C.A.A.F. 1997) (quoting Strickland, 466 U.S. at 687). To satisfy the prejudice prong of Strickland in a guilty plea case, the defense must also "show specifically that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

When challenging the performance of counsel, the defense bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance. See United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991). When there is a factual dispute, we determine whether further factfinding is required under United States v. Ginn, 47 M.J. 236 (C.A.A.F. 1997). If, however, the facts alleged by the defense would not result in relief under the high standard set by Strickland, we may address the claim without

the necessity of resolving the factual dispute. See id. at 248. Likewise, "we need not determine whether any of the alleged errors [in counsel's performance] establish[] constitutional deficiencies under the first prong of Strickland . . . [if] any such errors would not have been prejudicial under the high hurdle established by the second prong of Strickland." United States v. Saintaude, 61 M.J. 175, 183 (C.A.A.F. 2005).

B. ANALYSIS OF APPELLANT'S CLAIMS

1. *Disposition of the September 6, 2001, charges*

Appellant contends that his counsel were ineffective by focusing on the September 10, 2001 charges instead of the September 6, 2001 charges as the basis for the speedy trial motion. At trial, the defense counsel expressly stated that he was not arguing for the clock to start on September 6, 2001, but instead asked the military judge to focus on the September 10, 2001 charges. According to Appellant, had counsel focused on the September 6, 2001 charges, he would have prevailed at trial. Appellant's theory is that the September 6 charges had never been dismissed, which meant that the speedy trial clock had not stopped prior

to arraignment, and that the 120-day speedy trial standard in R.C.M. 707 had been violated. The record, in the context of addressing the later charges preferred on September 10, 2001, contains various references by the parties to the fact that charges were preferred initially on September 6 and "withdrawn" on September 10 a result of "an administrative error." The record, however, contains little information about the content or disposition of the September 6 charges.

There is a high hurdle that must be surmounted to prove an ineffective assistance claim and here Appellant has not met his initial burden of establishing a factual record that would permit us to ascertain the basis for his claim: the actual content of the September 6, 2001, charges, whether the document containing those charges constituted a legally sufficient preferral, see R.C.M. 307, and the official nature of any subsequent action on those charges are all undocumented. See, e.g., R.C.M. 401. There is no September 6, 2001 charge sheet in the record and there is no record of any official action with respect to that charge sheet. Appellant has not asserted that the Government has been unwilling or unable to produce the records. Likewise, Appellant has not asserted that he has been

unable to obtain affidavits from any of the participants in the charging and disposition process as to the content or action on those charges. In essence, Appellant asks us to speculate not only as to the facts that would establish the validity of the September 6, 2001, preferral for purposes of starting the speedy trial clock, but also as to the facts that would establish the invalidity of any subsequent disposition of those charges so that we reach the conclusion that the speedy trial clock ran continuously from September 6, 2001. Juxtaposed against the presumption of effective assistance of counsel required by Strickland, we decline Appellant's invitation to find his trial defense counsel ineffective for failing to challenge the disposition of the September 6, 2001 charges when Appellant has failed to provide an appellate record that documents the disposition of the charges. See Moulton, 47 M.J. at 229.

2. *The convening authority's action on the September 10, 2001, and October 10, 2001, charges*

Appellant contends that his counsel were deficient because they failed to tell him that his unconditional guilty plea would waive appellate

review of the speedy trial motion. Appellant's civilian and military trial defense counsel have submitted affidavits asserting that they provided appropriate advice, and their affidavits dispute Appellant's account of the nature of the advice that they provided. According to Appellant, had he been advised properly, he would have pled guilty only if the convening authority had agreed to a conditional guilty plea that preserved the speedy trial issue for appeal.

Even if we assume both that Appellant's factual assertions are valid and that failure to provide such advice was deficient under the first prong of Strickland, Appellant must demonstrate that he would prevail on his R.C.M. 707 speedy trial issue on appeal in order to establish prejudice under the second prong of Strickland. See Perez, 64 M.J. at 243. For the following reasons, we conclude that the military judge did not err and that Appellant would not have prevailed on appeal even if the issue had not been waived.

The charges that started the speedy trial clock under R.C.M. 707 were preferred against Appellant on September 10, 2001. On November 2, 2001, well within the R.C.M. 707 120-day period, the SJA provided the Special

Court-Martial Convening Authority with a recommendation that included an "Options" section that accurately set forth the convening authority's disposition choices under R.C.M. 404:

(1) "Dismiss the charges";
(2) "Forward the charges to a subordinate commander for disposition";
(3) "Refer charges to a summary or special court-martial"; or
(4) "Forward the Article 32 report with the charges, to the superior commander, 14 AF/CC, for disposition."

Here, the option to "Dismiss the charges" is critical for purposes of the speedy trial motion. If the convening authority chose the option to dismiss the charges, that stopped the speedy trial clock under R.C.M. 707(b)(3). On the other hand, if the convening authority did not choose "Dismiss the charges," more than 350 accountable days passed from preferral on September 10, 2001, to arraignment on November 20, 2002, a violation of Appellant's right to be brought to trial within 120 days under R.C.M. 707.

At trial, and on appeal, Appellant contends that the convening authority did not dismiss the charges, citing the SJA's recommendation that the convening authority "withdraw" the charges and the convening authority's one word action --"concur." Appellant's argument also focuses on the SJA's repeated use of the words "withdraw," "withdrawal," and "withdrawing" in his memorandum to the convening authority and on the charge sheet following the convening authority's decision. Appellant contends that the term "withdraw" should be given the meaning it has in R.C.M. 604, which permits charges that have been referred to a court-martial to be "withdrawn" and referred to another court-martial, subject to limited exceptions. As Appellant notes, the act of withdrawing a referred charge from a court-martial under R.C.M. 604 does not produce dismissal of the charges. United States v. Britton, 26 M.J. 24, 26 (C.M.A. 1988). Compare R.C.M. 604(a) (charges may be withdrawn only after they have been referred to trial), with R.C.M. 404(a) (preferred charges may be dismissed).

In Britton, charges that had been referred to trial were withdrawn by the convening authority and referred to another court-martial, with no

evidence of an intent by the convening authority to dismiss the charges. Britton, 26 M.J. at 26. The present case is distinguishable from Britton on several grounds. First, the parties in the present case agree that the charges had not been referred to a court-martial at the time of the convening authority's action, and that the convening authority could not "withdraw" the charges from a court-martial as a matter of law under R.C.M. 604. Second, the SJA's memorandum contains no suggestion that the charges had already been referred to a court-martial; on the contrary, the memorandum lists referral as an option for the convening authority. There is nothing in the memorandum that suggests the convening authority had the option of removing charges from an existing court-martial. Third, the SJA did not list withdrawal under R.C.M. 604 as an option, nor did the SJA otherwise refer to R.C.M. 604 in his memorandum, so there is no basis for concluding that the SJA sought to use the term "withdrawal" as it is used in R.C.M. 604 with respect to charges that have been referred to court-martial. Fourth, the Rules for Courts-Martial do not treat "withdrawal" as a defined term. In the operative language of the rules, the terms "withdraw" and "withdrawn" are expressly placed in the context of charges

referred to a courtmartial in the introductory sentence of R.C.M. 604(a) ("withdrawn from a court-martial") and R.C.M. 604(b) ("withdrawn from a court-martial"). The SJA did not refer to R.C.M. 604 or otherwise suggest that "withdraw" meant removing a referred charge from a court-martial. Fifth, the SJA advised the convening authority that "[w]ithdrawing the charges now will not prohibit re-preferral at a later time . . . ." We note that when charges are withdrawn under R.C.M. 604 they remain in effect, which would have rendered the SJA's discussion of "repreferral" -- an action that is required after charges are dismissed -- superfluous and inapplicable. We also observe that as a matter of common usage, the definition of the term "withdraw" specifically includes "to abandon the prosecution of." See Webster's Third New International Dictionary Unabridged 2626 (1986). In that context, one can reasonably infer that the SJA intended to use "withdraw" in its colloquial sense of abandoning prosecution and thus was indicating the option of dismissal. Finally, we note the numerous actions taken by the prosecution and defense in the aftermath of the convening authority's action, as described by the military judge and summarized in Part

I.C., supra, all of which were consistent with dismissal of the charges.

In light of the foregoing, this is not a case like Britton where the convening authority had the option of either dismissal or withdrawal and we are required to ascertain from the documents which of two valid options were chosen. In such a case, use of the term "withdraw" would be problematic. Here, however, we have an SJA providing the convening authority with only one such option -- dismiss -- and using common language which has the same colloquial meaning as dismissal. Although we do not recommend use of the word "withdrawal" to implement a dismissal of charges, the SJA's accurate presentation of dismissal as an option in the present case and the convening authority's decision to concur are sufficient, in the circumstances of this case, to dismiss the charges on November 6, 2001 and stop the R.C.M. 707 speedy trial clock.

3. *Propriety of the convening authority's disposition of the 2001 charges*

"[O]nce charges are dismissed, absent a subterfuge, the speedy-trial clock is restarted." United States v. Anderson, 50 M.J. 447, 448

(C.A.A.F. 1999). Here, Appellant contends that even if the convening authority dismissed the September 10, 2001 charges on November 6, 2001, there was no "satisfactory reason to dismiss the charges." In the SJA's November 2, 2001 memorandum to the convening authority, the SJA offered the following in support of dismissing the charges: "[i]nformation has come to the attention of the AFOSI through very reliable sources that significant weapons related offenses -- a joint federal law enforcement investigation is ongoing – involving the subject and gun dealers." He added that this information put the charged offenses "into proper context" and that the charges could be re-preferred "at a later time – in approx[imately] three months as this investigation is completed." Appellant contends that the SJA's recommendation on disposition was not legitimate because the AFOSI and civilian law enforcement agencies were not engaged in a "joint investigation."

The military judge, in his findings of fact, found that "a formal joint federal investigation did not exist between the AFOSI and either the FBI [Federal Bureau of Investigation] or the ATF [Bureau of Alcohol, Tobacco, and Firearms] with regard to this case . . . ." The military judge

also found that "all three agencies were sharing information with each other concerning investigations that were being conducted by each agency which were somewhat interrelated with each other." On appeal, we accept the military judge's findings of fact unless they are clearly erroneous. Mizgala, 61 M.J. at 127. Appellant has not challenged the military judge's finding that the three agencies were conducting "interrelated" investigations and sharing information with each other. Appellant also has not claimed that the SJA deliberately misled the convening authority, and it is not apparent whether the SJA had been is informed about the specific relationship among the various agencies, or whether he was simply imprecise when he referred to a "joint investigation."

Nonetheless, the import of his communication to the convening authority was that multiple federal agencies were continuing investigative efforts with respect to Appellant's activities. Appellant has not demonstrated why it would make any difference, for purposes of dismissing charges, whether the action was based upon the existence of a "joint" investigation or several parallel investigations. In the circumstances of the present case, the existence of parallel

investigations and the decision to await their completion to fully ascertain the number and nature of offenses constituted a legitimate reason for dismissing the charges with a view towards later re-preferral. See R.C.M. 401(c)(1) Discussion ("It is appropriate to dismiss a charge and prefer another charge anew when, for example, the original . . . did not adequately reflect the nature or seriousness of the offense."); cf. United States v. Cossio, 64 M.J. 254, 257 (C.A.A.F. 2007) (finding it not unreasonable under Article 10 for the government to wait for a forensic examination of evidence before proceeding to trial).

Appellant also contends that the convening authority's November 2001 disposition was deficient because the "real reason" for disposition of the charges in November 2001 "was because the government had not secured the proper approval necessary to ask for confinement for a reservist." as reflected in a contemporaneous AFOSI memorandum. The AFOSI memorandum at issue involved a request for analysis of Appellant's computer and it contained the following comment: "Due to a legal mistake, SUBJECT was brought onto active duty under the wrong orders and now his status must be approved by SECAF. The legal

office must now drop all charges and refile (the original Article 32 already has been completed)." The military judge, however, did not adopt the defense's view that this comment, rather than the explanation in the SJA's recommendation, was the reason for the dismissal. The military judge noted that the agent who drafted the AFOSI memorandum could not "recall how, or from whom, he received the information" about the charges. Accordingly, the military judge focused solely on the ongoing investigation as the basis for the convening authority's disposition of the charges, and concluded that it was a valid basis for the dismissal in November 2001.

The defense has not established that the military judge erred in his findings of fact. At trial, the AFOSI agent made it clear that he could not recall the basis for his comments in the memorandum regarding dismissal of the charges. The defense did not introduce further evidence from persons who had direct knowledge of the disposition, such as the SJA or the convening authority. In that posture, the military judge had a sufficient basis for determining that the comment about Secretarial approval in the AFOSI memorandum, without more, did not support a finding that the

command had, in fact, made the disposition decision for that reason. On appeal, the defense has not provided any new information, in the form of affidavits from the SJA, convening authority, or otherwise, that would lead us to conclude that the military judge erred in his findings of fact, or that trial defense counsel erred by not calling either the SJA or the convening authority as witnesses.

Even if the desire to obtain Secretarial approval was a matter considered by the SJA or the convening authority in November 2001, that would not establish that the command took such action as a subterfuge to evade the R.C.M. 707 speedy trial clock. Appellant has not set forth legal authority for the proposition implicit in his argument -- that the convening authority found it necessary to dismiss the charges in November 2001 because of a defect in Appellant's orders. Assuming that Secretarial approval of the orders was required as a result of Appellant's status as a reservist in order to preserve the potential for a sentence to confinement, see Article 2(d)(5)(A), UCMJ, 10 U.S.C. § 802(d)(5)(A) (2000), the law does not require dismissal of the charges as a predicate for obtaining such orders. Moreover, Secretarial approval is not required under Article 2 for the preferral of charges. Most

significantly, the defense has not demonstrated that the charges were dismissed on November 6, 2001, for the purpose of providing a sufficient opportunity to obtain Secretarial approval prior to expiration of the 120-day speedy trial clock. At that point, less than sixty days had expired and the defense has not shown that anyone in authority had determined that the remaining period on the clock was insufficient to obtain Secretarial approval.

Under the foregoing circumstances, Appellant has not established that the "real reason" the convening authority disposed of the charges in November 2001 was the failure to obtain Secretarial approval. Moreover, the defense has not demonstrated that the dismissal was a subterfuge designed to defeat the 120-day speedy trial clock. Accordingly, irrespective of whether counsel advised Appellant that his unconditional guilty plea waived further review of his R.C.M. 707 motion, his ineffective assistance of counsel claim fails under the second prong of Strickland. There is no prejudice to Appellant because he has not established that he would have prevailed on appeal.

4. *Article 10*

Appellant contends that trial defense counsel were ineffective because they did not focus on the Article 10 issue at trial. Article 10 requires the government to act with reasonable diligence to bring charges to trial when an accused is under arrest or confinement, or under certain forms of restriction. See supra Part I.E.1. At trial and on appeal, the defense has not identified a period of arrest or confinement that would require the application of Article 10 to this case, nor has the defense demonstrated that the nature of any restriction in this case would have triggered Article 10. We note, however, that during sentencing, the military judge awarded credit for the forty-seven days in 2001 that Appellant was restricted to the base and county prior to preferral of the charges. For purposes of addressing the ineffective assistance claim, we shall assume without deciding that the forty-seven-day restriction is sufficient to trigger the application of Article 10.

Because the protections of Article 10 are broader than R.C.M. 707, our resolution of Appellant's claim under R.C.M. 707 in Part III.B.2., supra, does not necessarily resolve the claim under Article 10. See United States v.

Kossman, 38 M.J. 258, 261 (C.M.A. 1993). The test under Article 10 is whether the government has acted with reasonable diligence. Id. at 262. We take into account the four factors applicable to litigation of speedy trial claims under the Sixth Amendment: "(1) length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." Mizgala, 61 M.J. at 129 (citing Barker, 407 U.S. at 530).

Appellant, however, has not identified specific factors in the present case that would enable him to prevail under Article 10 even if unsuccessful under R.C.M. 707. Rather, Appellant relies primarily on his R.C.M. 707 argument that the convening authority did not properly dismiss the charges in November 2001 to argue that there was a lack of reasonable diligence in terms of the length of delay and the reasons for the delay. As discussed in Part III.B.2., supra, we have concluded that the convening authority dismissed the charges in November 2001 and had a legitimate reason for doing so. In light of the command's decision to dismiss the charges and defer any action until the outcome of the ongoing investigation was known, Appellant has not demonstrated that the Government failed to proceed with reasonable diligence, either with

respect to the length of the delay or with respect to the reasons for the delay. In that posture, he has not established that he would prevail on appeal had his counsel pursued a different strategy at trial by making the motion under Article 10, in addition to R.C.M. 707, and Appellant's ineffective assistance counsel claim fails under the second prong of *Strickland*.

IV. PROVIDENCY OF PLEA

Appellant contends that his plea was improvident because it was based on the mistaken belief that his R.C.M. 707 speedy trial issue would be preserved for appeal. The "decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citation omitted). "An appellant who challenges the providency of a guilty plea must demonstrate 'a substantial basis in law and fact for questioning the guilty plea.'" *United States v. Pena*, 64 M.J. 259, 267 (C.A.A.F. 2007) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

Appellant argues that several factors render his plea improvident: (1) his trial defense counsel did not tell him his plea would waive appellate

review of the R.C.M. 707 speedy trial issue: (2) the military judge "apparently expected the issue to be reviewed on appeal" because in his ruling on the speedy trial motion he mentioned "' [i]n the event it's later determined that my findings as to when the speedy trial clock started was erroneous'"; and (3) the military judge did not explain that his plea waived the speedy trial issue. These factors do not render his plea improvident.

We have addressed the first factor in our previous discussion and resolution of his ineffective assistance of counsel claim. *See supra* Parts III.B.2., III.B.3. As to the second, the fact that the military judge provided alternative theories for consideration on appeal reflects the reasonable actions of a military judge at trial, not any lack of merit to the military judge's rulings nor any considered decision by him that an unconditional guilty plea would not waive the R.C.M. 707 issue in Appellant's case. Finally, the military judge does not have an affirmative duty under R.C.M. 910 to instruct an accused that an unconditional guilty plea waives further review of an R.C.M. 707 speedy trial claim. For these reasons, we find that Appellant has failed to demonstrate that his plea was improvident.

V.DECISION

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

CONCUR BY: RYAN (In Part)

DISSENT BY: RYAN (In Part); ERDMANN

DISSENT

RYAN, Judge (dissenting in part, concurring in part, and concurring in the result):

For the reasons set forth in Judge Erdmann's separate opinion, I respectfully dissent from the portion of the majority opinion that holds that the convening authority in this case "dismissed" charges it expressly stated were "withdrawn." However, I nonetheless concur in the result.

First, I agree with the majority's conclusion that, pursuant to Rule for Courts-Martial (R.C.M.) 707(e), Appellant, by pleading guilty, waived any claim under R.C.M. 707.

Second, I agree with the majority's conclusion that any speedy trial claim under Article 10, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 810 (2000), was waived. *See also*

United States v. Mizgala, 61 M.J. 122, 127 (C.A.A.F. 2005) (requiring a defendant to litigate an Article 10, UCMJ, claim prior to pleading guilty to avoid waiver).

Finally, I agree with the majority that Appellant's counsel was not ineffective for failing to litigate Article 10, UCMJ, at trial. However, as I agree with Judge Erdmann that the "withdrawal" of charges was a nullity, I would also address the granted issue -- whether Appellant's counsel was ineffective because he did not inform Appellant that a guilty plea waived appeal under R.C.M. 707.

I would resolve Appellant's ineffectiveness claim by addressing prejudice. *See United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006). In order to prevail on an ineffectiveness claim an appellant must show that there is a reasonable probability that "absent [counsel's] error, there would have been a different result." *United States v. Davis*, 60 M.J. 469, 474 (C.A.A.F. 2005) (citation omitted). In this case, only dismissal with prejudice would have yielded a different result. To warrant dismissal with prejudice under R.C.M. 707 a defendant must satisfy, among other things, the *Barker* test. See R.C.M. 707(d)(1); *Barker v. Wingo*, 407 U.S.

514, 530-33, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

Appellant has not shown the requisite prejudice to meet this high standard. During much of the delay period Appellant was released from active duty and at home. He has not shown an improper Government purpose for the delay. Nor has he proffered evidence of either oppressive pretrial incarceration or evidence that his "preparation for trial, defense evidence, trial strategy, or ability to present witnesses" were adversely impacted by the delay in this case. *Mizgala*, 61 M.J. at 129 (addressing the *Barker* factors). Because there was no material prejudice to Appellant's substantial rights under the facts of this case, I concur in the result.

ERDMANN, Judge (dissenting):

Because the convening authority's November 6, 2001, action did not dismiss the charges or stop the speedy trial clock, I respectfully dissent.

The Uniform Code of Military Justice and the *Manual for Courts-Martial* (*MCM*) establish a unique system of justice. As a result, actions taken in the military justice system often have unique meanings and effects. "Dismissal" and

"withdrawal" are terms of art, with distinct meanings under the Rules for Courts-Martial (R.C.M.). A commander may "dismiss" charges and thereby extinguish them. R.C.M. 401(c)(1). "Withdrawal", on the other hand, can occur only after charges have been referred to a court-martial. R.C.M. 604(a). Withdrawal does not, however, extinguish the charges. The Government should be bound by the actual meaning of the terms it employs and I am not persuaded by subsequent arguments that we should construe those terms to mean something distinctly different and contrary to their ordinary meanings in the military justice system.

The staff judge advocate's November 2, 2001, memorandum to the convening authority specifically recommended in three separate sentences that the charges be "withdrawn." The convening authority specifically "concur[red]" with that recommendation. In addition, the initial charge sheet reflects that the charges were "withdrawn." Because none of these charges had been referred for trial by courts-martial, withdrawal was not possible. The purported withdrawal was a legal and factual nullity.

There is no evidence or manifestation of the

convening authority's intent supporting any conclusion that these charges were dismissed. This court should not rewrite the procedural history of this case to come to that conclusion. The UCMJ and *MCM* establish rules and procedures as determined by the Congress and President, respectively. To the extent that those rules and our decisions demand procedural compliance from the defense, so too should we demand adherence to the rules by the Government. Withdrawal of these unreferred charges was a nullity that this court should not convert into a legal dismissal of the charges.

Turning to the speedy trial issue, I agree with the majority that Tippit's unconditional guilty pleas waived the Sixth Amendment and R.C.M. 707 speedy trial issues. However, in the context of this case and as framed by the parties at trial, I conclude that the issue of Tippit's right to a speedy trial under Article 10, UCMJ, 10 U.S.C. § 810 (2000), was preserved for appellate review. *See United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005). Although the defense's written speedy trial motion did not specifically rely upon Article 10, UCMJ, the Government obviously recognized the applicability of this fundamental right and argued in its written response that Article 10,

UCMJ, had not been violated. In turn, the military judge recognized that the issue had been placed before him. He considered and ruled upon Tippit's right to a speedy trial under Article 10, UCMJ, and found that the Government had proceeded with reasonable diligence. Tippit subsequently appealed the Article 10, UCMJ, speedy trial issue to the Court of Criminal Appeals, which reviewed the Article 10, UCMJ, issue and affirmed the military judge's determination. In my view this constitutes litigation of the Article 10, UCMJ, speedy trial issue at trial and preserves the matter for appellate review. *Mizgala*, 61 M.J. at 127. Just as the Court of Criminal Appeals did, I would proceed to review Tippit's Article 10, UCMJ, claim.

Because the charges were never dismissed, the Government's accountability for speedy trial commenced on September 10, 2001, and October 10, 2001, when the charges in this case were preferred. That accountability continued uninterrupted up to the time of Tippit's trial -- an excessive delay of over one year. "[The] framework to determine whether the Government proceeded with reasonable diligence includes balancing the following four factors: (1) the length of the delay; (2) the

reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *Mizgala*, 61 M.J. at 129 (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999)).

Although there may have been some complexity involved in the forensic investigation of this case, I conclude that this delay was unjustified and well beyond that which can be considered reasonably necessary. Tippit demanded a speedy trial on August 20, 2001. During this period of delay, Tippit was restricted on June 15, 2001, released from active duty on November 6, 2001, recalled to active duty on June 5, 2002, and reported for duty two days later. Trial did not commence until November 21, 2002. This extended process strained Tippit's family relationships, disrupted his civilian affairs, and placed added burdens upon his wife. The fact that Tippit was misadvised that the charges were dismissed, the uncertainty he experienced in his civilian life, and the disruption in his personal life constitute unusual anxiety that I find prejudicial. *See id.* (citing *Barker*, 407 U.S. at 532).

I would conclude that the Government failed to act with due diligence to bring Tippit to trial and that Tippit was prejudiced by the delay in violation of Article 10, UCMJ. Therefore, I would set aside the decision of the Court of Criminal Appeals, set aside the findings and sentence, and dismiss the charges with prejudice. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). Accordingly, I would not reach the ineffective assistance of counsel claim or the providence of Tippit's guilty pleas.

Appendix B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ROBERT D. TIPPIT

United States Air Force

ACM 35624

14 July 2006

Sentence adjudged 9 January 2003 by GCM convened at Peterson Air Force Base, Colorado. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement 47 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Carlos L. McDade, Colonel Nikki A. Hall, Major Terry L. McElyea, Major Sandra K. Whittington, Major Jennifer K. Martwick, and Major David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Kevin P. Stiens, and Major Jin-Hwa L. Frazier.

Before

STONE, SMITH and MATHEWS

Appellate Military Judges

OPINION OF THE COURT

STONE, Senior Judge:

In accordance with his pleas, the appellant was convicted of dereliction of duty, violation of a lawful general regulation, filing a fraudulent travel voucher, and conduct prejudicial to good

order and discipline.[1] A military judge, sitting alone as a general

[1] *See* Articles 92, 132, and 134, UCMJ, 10 U.S.C. §§ 892, 932, 934.

court-martial, sentenced him to a bad-conduct discharge, confinement for 47 days, and reduction to the grade of E-1. The appellant raises the following issues for our review:

> I.
>
> WHETHER THE MILITARY JUDGE ERRED IN FINDING THERE WAS A "DE FACTO DISMISSAL" OF THE CHARGES AGAINST APPELLANT ON 6 NOVEMBER 2001 THAT WAS DONE FOR A LEGITIMATE REASON.
>
> II.
>
> WHETHER THE MILITARY JUDGE ERRED IN FINDING THAT APPELLANT WAS NOT DENIED THE RIGHT TO A SPEEDY TRIAL UNDER ARTICLE 10, UCMJ [, 10 U.S.C. § 810].
>
> III.
>
> WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF

COUNSEL WHEN HIS TRIAL DEFENSE COUNSEL DID NOT INFORM HIM THAT AN UNCONDITIONAL GUILTY PLEA WAIVED THE SPEEDY TRIAL ISSUE UNDER [RULE FOR COURTS-MARTIAL (R.C.M.)] 707.[2]

IV.

WHETHER APPELLANT'S PLEA WAS IMPROVIDENT WHERE IT WAS ENTERED UPON THE MISTAKEN BELIEF THAT HIS R.C.M. 707 SPEEDY TRIAL ISSUE WOULD BE PRESERVED FOR APPEAL.[3]

Background

The appellant was a Reservist performing inactive duty training as a Security Forces troop at Peterson Air Force Base (AFB), Colorado. On 11 June 2001, the last day of his training tour, he drove his pickup truck onto base and parked it near the Security Forces offices, his duty location. By happenstance, Security Forces personnel were conducting a training exercise involving a military working dog team in the same parking lot. A dog trained in bomb detection alerted on the appellant's truck. When

a flight sergeant asked the appellant for permission to search the truck. the appellant consented.

[2] This issue is raised pursuant to *United States v. Grostefon*. 12 M.J. 431 (C.M.A. 1982).

[3] This issue is raised pursuant to *Grostefon*. 12 M.J. at 431. We have considered this issue and found it to be without merit. *See United States v. Matias*. 25 M.J. 356 (C.M.A. 1987). The search led to the discovery of a large cache of firearms. ammunition. and related paraphernalia. Believing that at least some of the weapons and ammunition might be stolen. the local detachment of the Air Force Office of Special Investigations (AFOSI) opened an investigation. The appellant's training tour was extended. and he was ordered to remain within the confines of El Paso County. Colorado. the county in which the base is situated.[4] As a consequence. the appellant was unable to return to his home in Arizona. On 20 August 2001. after more than two months in this status. the appellant made a demand for a speedy trial.

Procedural Background

Charges were preferred against the appellant on four separate occasions. For convenience, we shall refer to the 6 September 2001 charges as the "original charges," and the 10 September 2001 and 10 October 2001 charges collectively as the "2001 charges." The final set of charges in this case, preferred in July 2002, will be referred to as the "2002 charges."

On 6 September 2001, the government preferred the original charges. The precise nature and ultimate disposition of these charges is unclear. According to the trial counsel, they were "withdrawn" because of "an administrative error" on 10 September 2001. The record does not clearly indicate who "withdrew" these charges or under what authority they purported to dispose of them. But at trial and on appeal, the appellant's counsel have not challenged the manner in which these charges were handled.[5]

New charges were preferred on 10 September 2001. Documents in the record of trial suggest these new charges were similar to the original set, but were apparently "redrafted" in ordered to "better state the alleged offenses." The next day, the special court-martial convening authority appointed an investigating officer to

conduct what would be the first of two inquiries held pursuant to Article 32, UCMJ, 10 U.S.C. § 832. Because of the terrorist attacks of 11 September 2001, this hearing did not begin until 10 October 2001. On that date, the government preferred an additional charge.

Soon after this initial Article 32 hearing, the local AFOSI detachment prepared a memorandum requesting another AFOSI detachment conduct a forensic media analysis of the appellant's home computer. It provided justification to support the request for investigative support, as well as background information. This memorandum was the

[4] The military judge determined the appellant was subjected to pretrial conditions tantamount to confinement and awarded the appellant 47 days of credit towards his sentence to confinement. *See United States v. Mason*, 19 M.J. 274 (C.M.A. 1985).

[5] Despite the defense's forthright acknowledgement that the original charges posed no problems with the speedy trial issue litigated at trial, the dissent nonetheless presumes the disposition of this preferral was "defective."

cornerstone of the trial defense counsel's claim that the disposition of the 2001 charges was simply a subterfuge to avoid problems with the speedy trial clock. Specifically, the trial participants focused on paragraph 2 of the request, which stated:

> **PRIORITY**: High command, local, and federal agency [Federal Bureau of Investigation and Alcohol, Tobacco, and Firearms] interest. SUBJECT was discovered on base with a large cache of weapons, munitions, communication devices, a full-face hooded mask, and other items. . . . SUBJECT has been brought on active duty and confined to base pending completion of this investigation. *Due to a legal mistake, SUBJECT was [brought] onto active duty under the wrong orders and now his status must be approved by [the Secretary of the Air Force]. The legal office must now drop all charges and refile* . . . .

(Emphasis added.)

On 2 November 2001, the base staff judge advocate (SJA) forwarded the Article 32

investigative report to the special court-martial convening authority. The SJA also provided a written legal opinion entitled, "Recommendation to Withdraw Charges – *United States v. SSgt Tippit*." It laid out a brief history of the case, but did not address any problems with the appellant's active duty status or any "legal mistake," as noted in the AFOSI memorandum. Instead, pursuant to R.C.M. 404(a)-(b), the SJA advised the convening authority as follows:

> The [investigating officer] recommends a trial by general courts-martial.
>
> [] Despite this recommendation I recommend that the charges be *withdrawn* at this time. Information has come to the attention of the AFOSI through very reliable sources that significant weapons related offenses—a joint federal law enforcement investigation is ongoing—involving the subject and gun dealers [sic]. This conduct puts the offenses with which [the appellant] is charged into proper context. *Withdrawing* the charges now will not prohibit *re-preferral* at a later time. . . .

> [] Options: Pursuant to RCM 404, as the special court-martial convening authority, you may: (1) *Dismiss* the charges. (2) Forward the charges to a subordinate commander for disposition. (3) Refer charges to a summary or special court-martial, or (4) Forward the Article 32 report with the charges, to the superior commander, 14 AF/CC, for disposition.
>
> [] Recommendation: that you authroize [sic] the SJA to *withdraw* charges by lining through the charge sheet.

(Emphasis added.)

On 5 November 2001, the convening authority initialed the SJA's memo and hand-wrote the single word "Concur." The following day, the SJA lined through charges on both the 10 September 2001 and 10 October 2001 charge sheets, wrote "WITHDRAWAL" on two pages and "WITHDRAWN" on another, and signed all three pages. *See* R.C.M. 401(c)(1), Discussion ("Charges are ordinarily dismissed by lining out and initialing the deleted specifications or otherwise recording that a specification is dismissed"). Some time

afterward. the appellant was informed that charges had been dropped. *See id.* ("When all charges and specifications are dismissed. the accuser and the accused ordinarily should be informed"). He was then released from active duty to return to his family in Arizona. He resumed his civilian life. finding new employment and becoming a father.

In January 2002. command and legal staff began processing paperwork to recall the appellant to active duty. The base SJA forwarded the request through legal channels to obtain permission from the Secretary of the Air Force. That request was granted on 23 May 2002. and the appellant was ordered back onto active duty on 5 June 2002 to face court-martial charges. The appellant reported for duty on 7 June 2002. For reasons not explained in the record of trial. charges were not preferred again for almost four more weeks. on 2 July 2002.

On 15 July 2002. a new Article 32 investigating officer was appointed. and a hearing was set for 17 July 2002. The appellant initially requested a delay until 5 August 2002 to permit his civilian counsel to attend the second Article 32 hearing. but eventually elected to waive the hearing. Despite the appellant's waiver. the government

chose to proceed with the Article 32 hearing as scheduled. Upon its completion, a copy was served on the appellant and his counsel, who made no objection to the report.[6] Charges were ultimately referred to a general court-martial.

On 19 November 2002, the trial defense counsel filed a motion to dismiss based upon a denial of his right to a speedy trial. He alleged the 2001 charges were not properly withdrawn because they had never been referred to trial.[7] In response, the government argued that the withdrawal of the 2001 charges was not a withdrawal, but was "in essence" a dismissal under R.C.M. 404(a). The appellant countered this argument by suggesting that the dismissal was an improper subterfuge meant to keep the appellant in limbo and avoid the running of the speedy trial clock.

[6] *See generally* R.C.M. 405(j)(4) (objections to the report shall be made within five days of its receipt) and R.C.M. 405(k) (failure to object to the report constitutes waiver of any objection).

[7] *See* R.C.M. 604(a) (charges and specifications may only be "withdrawn" after they have been referred to trial).

The appellant was arraigned on 21 November 2002. During a pretrial session held pursuant Article 39(a), UCMJ, 10 U.S.C. § 839(a), the appellant's counsel sought to compel discovery of records pertaining to the "ongoing" law enforcement investigation cited by the SJA as the rationale for his recommendation to the convening authority to "withdraw" the 2001 charges. The government was ordered to produce the records, and owing to the schedules of the parties, the court-martial then recessed until 8 January 2003.

Armed with their additional discovery, the trial defense counsel vigorously contested the SJA's claim in his 2 November 2001 letter to the convening authority that there was an ongoing "joint" federal investigation of the appellant. The AFOSI case agent and detachment commander both testified that, although there was information sharing between their office and other federal agencies, there was no official joint investigation. Neither party called the SJA to explain the provenance of his claim.

The appellant's counsel argued that the "true" reason for the withdrawal of the 2001 charges was because the legal office had concluded, after preferral, that the appellant, a Reservist, could not properly be tried without approval from the Secretary of the Air Force. Without explicitly claiming that the SJA lied in his memo to the convening authority, the appellant's counsel attacked the factual basis for the memo's claim that there was an "ongoing" investigation. They attempted to cast doubt on the government's explanation of why the government dismissed the 2001 charges, arguing the SJA was merely trying to "rationalize" the lengthy delay, and observing that the government's explanation "doesn't make sense."

Waiver

We begin with a discussion of whether the appellant's speedy trial issues were waived by his unconditional guilty pleas. R.C.M. 707(e) specifically provides that "a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense." *See also United States v. Mizgala*, 61 M.J. 122, 125 (C.A.A.F. 2005). On the other hand, a speedy trial motion

litigated under Article 10, UCMJ, 10 U.S.C. § 810, "is not waived by a subsequent unconditional guilty plea." *Id.* at 127.

In determining whether we should address the otherwise waived R.C.M. 707 speedy trial issue, we have taken into account the appellant's personal assertion of error that his counsel were ineffective for failing to advise him that his unconditional guilty plea waived his R.C.M. 707 speedy trial claim. To resolve this ineffective assistance of counsel issue, we apply a three-pronged analysis to determine whether a presumption of competence has been overcome:

(1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?

(2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers"? and

(3) If a defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result.

United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

If we were to assume—without deciding—that the appellant has met his burden as to the first two prongs, we would be required to address the R.C.M. 707 claim to determine if there was any prejudice to the appellant. Because we elect to resolve the appellant's ineffective assistance of counsel claim by relying on the merit, or rather the lack of merit, of the R.C.M. 707 claim, in the interest of judicial economy, we decline to apply waiver.

Discussion

A trial court's conclusion that an accused received a speedy trial for R.C.M. 707 purposes is a legal question that is reviewed de novo on appeal. *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999). The trial court's findings of fact are given "substantial deference and will be reversed only for clear error." *Id.* (quoting *United States v. Taylor*, 487 U.S. 326, 337 (1988)). Similarly, for speedy trial questions involving the Sixth Amendment and Article 10, UCMJ, we conduct a de novo review of the legal question of whether the government has exercised "reasonable diligence in discharging

its duty . . . to try an accused." *United States v. Cooper*, 58 M.J. 54, 59 (C.A.A.F. 2003). We accord the lower court's factual determinations deference and reject them only if they are clearly erroneous. *Id.* at 58 (citing *United States v. Brown*, 285 F.3d 959, 961 (11th Cir. 2002)). The burden of persuasion is on the government to justify a delay. *United States v. Cook*, 27 M.J. 212, 215 (C.M.A. 1988).

We turn to the appellant's first contention relating to the speedy trial provisions of R.C.M. 707. This Rule requires an accused to be brought to trial within 120 days after the earlier of preferral of charges, imposition of restraint, or entry on active duty. The appellate contends the 2001 charges were never properly dismissed and thus the speedy trial clock was not reset. Thus, if the charges were not properly dismissed on 10 September 2001, 363 days passed (after allowing a deduction for delays attributable to the defense) from preferral to arraignment.

Unfortunately, military appellate courts have often been called upon to determine whether charges were properly dismissed or merely withdrawn. *See, e.g., United States v. Underwood*, 50 M.J. 271, 272-75 (C.A.A.F. 1999); *United States v. Britton*, 26 M.J. 24, 26 (C.M.A. 1988); *United States v. Gray*, 26 M.J. 16, 21 (C.M.A. 1988) (Everett, C.J., concurring

in the result); *United States v. Mickla*, 29 M.J. 749, 751-52 (A.F.C.M.R. 1989); *United States v. Robinson*, 47 M.J. 506, 509-11 (N.M. Ct. Crim. App. 1997); *United States v. Weatherspoon*, 39 M.J. 762, 766 (A.C.M.R. 1994); *United States v. Bolado*, 34 M.J. 732, 737-38 (N.M.C.M.R. 1991), *aff'd*, 36 M.J. 2 (C.M.A. 1992); *United States v. Lorenc*, 30 M.J. 619, 620-23 (N.M.C.M.R. 1990). These courts have applied the concept of "de facto dismissal" whenever: (1) there has been substantial compliance with the Rules for Courts-Martial; (2) the intent to dismiss is clear despite faulty draftsmanship; (3) the government's conduct was consistent with a dismissal; and (4) the dismissal was done for a proper purpose.

After making extensive findings of fact, the judge below concluded there had been a "de facto dismissal" of the charges on 6 November 2001. In making this conclusion, he relied on (1) the convening authority's concurrence with the SJA's recommendation to withdraw the charges; (2) the lining out of all of the charges and specifications by the SJA; (3) the government's notification to the accused and counsel that charges had been "dropped"; and (4) the release of the appellant from active duty. *Cf. United*

States v. Mucthison, 28 M.J. 1113, 1114-15 (N.M.C.M.R. 1989).

We likewise conclude that the convening authority's 2 November 2001 concurrence with the SJA's recommendation to "withdraw" charges was a "de facto dismissal." The convening authority's decision could not legally have been a withdrawal because there had been no referral, and thus there was no court-martial from which to withdraw the charges and specifications. *See id.* In the universe of options, that only leaves dismissal, and the actions taken after the convening authority's concurrence on 2 November 2001 are the types of things that would have been done in a technically sound dismissal.

Moreover, the government's actions reflect an intent to dismiss the charges. In *Britton*, our superior court noted there are "substantial differences" between dismissal and withdrawal of charges. 26 M.J. at 26. Chief among these are that with a proper dismissal, an accused no longer faces charges, and to bring them anew "requires the command to start over. The charges must be re-preferred, investigated, and referred in accordance with the Rules for

Courts-Martial, as though there were no previous charges or proceedings." *Id.*

Despite the government's repeated use of the word "withdrawal" when it meant "dismissal," the government's actions consistently comported with an intent to dismiss charges, to include a new preferral, investigation,[8] and referral. Thus, the appellant was

[8] Our dissenting colleague suggests that the second Article 32 investigation was inadequate because the investigating officer used summarized testimony from the prior report and incorporated by reference the conclusions of the first investigating officer. The dissent applies an extremely narrow interpretation of *Britton*. The use of prior statements is permitted under R.C.M. 405(g)(4)(A). Moreover, the investigating officer's report clearly indicates she took a arraigned within 120 days of being brought back on active duty to face charges, as required by R.C.M. 707.

fresh look at the evidence, rendered a thorough and comprehensive report, and made independent conclusions and recommendations.

We next consider whether the charges and specifications were dismissed for a proper purpose. Once charges are dismissed, absent subterfuge, the speedy trial clock is restarted. *United States v. Anderson*, 50 M.J. 447 (C.A.A.F. 1999). *See also United States v. Thomas*, 41 M.J. 665 (A.F. Ct. Crim. App. 1994) (dismissal must be for a "satisfactory" reason). The nonbinding Discussion to R.C.M. 401(c)(1) states, "A charge should be dismissed when it fails to state an offense, when it is unsupported by available evidence, or when there are other sound reasons why trial by court-martial is not appropriate." The Discussion goes on to state, "It is appropriate to dismiss a charge and prefer another charge anew when, for example, the original charge failed to state an offense, or was so defective that a major amendment was required . . . or did not adequately reflect the nature or seriousness of the offense."

This list is by no means exhaustive. Nothing in the record of trial leads this Court to believe the decision to dismiss the charges and specifications was a subterfuge to avoid speedy trial problems. The record does provide two valid reasons for the dismissal. First, although the SJA was, once again, inartful when he

referred to a "joint investigation" between Air Force investigators and other federal agencies, there was, in fact, interest in the appellant's case by other federal agencies that led to information sharing. Moreover, it was proper to seek Secretarial approval to recall the appellant to active duty. These concerns served legitimate command purposes.

Having found no merit to the appellant's claim that his right to a speedy trial under R.C.M. 707 was violated, we further find the appellant has failed to meet his burden of establishing prejudice under the third prong of our superior court's test for resolving ineffective assistance of counsel issues. *See Gilley*, 56 M.J. at 124; *Polk*, 32 M.J. at 153.

We turn now to the appellant's claim that the government violated his rights under Article 10, UCMJ. This statute provides, "When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." At trial, the judge below sua sponte considered whether the appellant's Article 10, UCMJ, rights were violated; he also considered those rights to a

speedy trial found in the Sixth Amendment to the United States Constitution. In doing so, he applied the proper balancing test and concluded the government acted with due diligence in bringing the appellant to trial. We agree. *See Barker v. Wingo*, 407 U.S. 514 (1972); *Mizgala*, 61 M.J. at 129; *United States v. Plants*, 57 M.J. 460 (C.A.A.F. 2002). The appellant's rights to a speedy trial under Article 10, UCMJ, and the Sixth Amendment to the Constitution were not violated.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are AFFIRMED.

Judge Smith participated in this decision prior to his reassignment.

MATHEWS, Judge (dissenting):

The majority opinion rests on the premise that because there is no merit to the appellant's speedy trial complaints, his claims of ineffective

assistance of counsel are likewise without merit. Because I am unable concur with the majority's premise, I cannot join in its conclusion.

As the majority notes, the appellant was served with three discrete sets of charges: the charges preferred on 6 September 2001 (referred to by the majority as the "original charges"); those preferred on 10 September 2001 and joined by an additional charge on 10 October 2001 (the "2001 charges"); and the charges preferred on 2 July 2002 (the "2002 charges"). These charges were, in essence, successive iterations of the same allegations: the 2002 charges on which the appellant was convicted were simply new versions of the 2001 charges, which in turn were redrafted versions of the original charges. By the time the appellant was finally arraigned in 2002, he had been facing the same charges for over 14 months -- well beyond the 120-day limit of R.C.M. 707.

To affirm the appellant's conviction, this Court must find that the speedy trial clocks that commenced with the preferral of the original charges and the 2001 charges both stopped and were reset to zero. Under the rationale embraced by the majority it is necessary, first, to

altogether ignore the defective disposition of the original charges, and next, to retroactively cure the improper handling of the 2001 charges by judicially converting the convening authority's direction to "withdraw" those charges into a dismissal of the same charges. In effect, we are asked to rescue the government from its own ineptitude not once, but twice. Because I do not believe the facts support such a double-barreled salvage operation, I respectfully dissent.

The Original Charges

The military judge did not enter findings of fact concerning the disposition of the original charges. The record of trial, however, contains parallel averments from trial counsel and trial defense counsel that these charges were preferred on 6 September 2001 and served on the appellant the same day. They were purportedly "withdrawn" four days later by the local trial counsel, Capt D,[9] for reasons that are unclear from the record.[10] The charges preferred on 10 September 2001 were "basically the same" as the original charges.

The parties at trial stipulated that the date of preferral of the original charges was one of the first dates "relevant to compliance with the speedy trial rules." Under the Rules for Courts-Martial, they were correct. Once the original charges were preferred, the appellant's first speedy trial clock began running. R.C.M. 707(a); *United States v. Gray*, 26 M.J. 16, 20 (C.M.A. 1988). Capt D's action did not stop that clock, much less reset it to zero. *See United States v. Britton*, 26 M.J. 24, 26 (C.M.A. 1988). The majority opinion concludes that the disposition of the 2001 charges amounted to a "de facto dismissal" that reset the appellant's second speedy trial clock, without ever addressing the one that began running with the preferral of the original charges. Unless Capt D's purported "withdrawal" can somehow be converted into yet another "de facto dismissal," that clock continued to run.

The record does not support such a conversion. As the majority opinion rightly concludes, the "convening authority's concurrence" is a necessary prerequisite for finding a "de facto dismissal" of charges. There is no evidence of such concurrence with regard to the original charges. The facts presented at trial were that the convening authority withdrew the 2001

charges, but that Capt D withdrew the original ones.[11] Such an error is not particularly surprising in this case. The disposition of the original charges was handled by the same cast of characters who, a few weeks later, bungled the disposition of the 2001 charges.

[9] A circuit trial counsel later joined the prosecution team, but does not appear to have played any part in the disposition of the original charges.

[10] The parties agreed to allow the military judge to consider their offers of proof as fact when deciding the appellant's speedy trial motion. Both parties agreed that the original charges were properly preferred by the appellant's commander, Lt Col A, a person subject to the UCMJ, on 6 September 2001 and "withdrawn" four days later. Capt D asserted that the original charges suffered from an unspecified "administrative error" necessitating their withdrawal. The defense team noted that the error was apparently one of draftsmanship, and that the original charges were simply put aside in favor of better-written ones. Neither asserted that the convening authority was in any way involved.

[11] Indeed, the record does not even suggest that the convening authority was aware of the existence of the original charges, let alone Capt D's disposition of them. None of the voluminous correspondence or reports provided to or originating from the convening authority make any mention the original charges, let alone their purported "withdrawal."

When, as here, the trial counsel simply puts the charge sheet in his back pocket, the speedy trial clock does not stop. The appellant was not arraigned on the offenses alleged in the original charges until 21 November 2002, more than 14 months after preferral and long after his demand for a speedy trial. The majority opinion gives short shrift to these facts, noting merely that the defense counsel "have not challenged" the disposition of the original charges.[12] The majority thus infers that there was no speedy trial violation because competent counsel would have alleged it, while disposing of the appellant's allegations that his trial counsel were ineffective by concluding there was no speedy trial violation.

The 2001 Charges

Unlike the original charges, there is evidence that the 2001 charges were disposed of with the concurrence of the convening authority. However, the disposition authorized by the convening authority -- *withdrawal* of the 2001 charges -- was not permissible under the Rules for Courts-Martial. Like Capt D's disposition of the original charges, this action, too, was a nullity for speedy trial purposes.

As noted above, converting the convening authority's improper withdrawal of charges into a "de facto dismissal" amounts to an act of judicial grace, saving the government from its own error. No gift is totally without cost, of course, and in this instance our largesse is bestowed at the expense of the appellant. Despite the government's consistent characterization of its action as "withdrawal" of the 2001 charges,[13] the majority concludes that "the government's conduct was consistent with a dismissal," and therefore entitled to the same legal effect. As appellate counsel for the government put it: "If it walks like a duck, talks like a duck, and looks like a duck, even if you call it a cow, it's still a duck."

But the disposition of the 2001 charges was an odd beast, neither fish nor fowl, and therefore not entitled to the same legal effect as a proper dismissal. Contrary to the dictates of our superior appellate court in *Britton*, the government did not investigate and refer the 2002 charges "as though there were no previous charges or proceedings." 26 M.J. at 26. Instead, the Article 32 investigation of the 2002 charges relied on evidence from the previous hearing[14] and incorporated by reference the conclusions of the first investigating officer. The SJA's advice to the general court-martial convening authority

[12] The majority opinion suggests the defense made a "forthright acknowledgement" that there was nothing wrong with the handling of the original charges. In fact, however, the appellant's trial defense counsel merely noted, in the context of challenging the disposition of the 2001 charges, that the four-day period between preferral of the original charges and the 2001 charges might "arguably" be omitted from the speedy trial clock for the latter.

[13] Indeed, documents in the record of trial show that the trial counsel continued to refer to the 2001 charges as having been "withdrawn" even *after* the appellant's trial.

14

Including the testimony of five witnesses from the first proceeding who did not testify at the second.

recommended referral of the charges with modifications, subsequently adopted, based on evidence obtained at the earlier proceeding.

As noted in the majority opinion, the appellant did not object to the second Article 32 report, thus waiving any defects *in the investigation*. The issue before us, however, is not whether the investigation was defective, but whether it was conducted in a manner consistent with the government's belated claims of dismissal. Because the government did *not* act in such a manner, I would reject appellate government counsel's barnyard analogy and conclude that there was no proper dismissal. The appellant's speedy trial right under R.C.M. 707 was violated.

Ineffective Assistance of Counsel

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States*

v. Knight, 53 M.J. 340, 342 (C.A.A.F. 2000)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel are presumed to be competent. Where there is a lapse in judgment or performance alleged, we ask first whether their conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Id.* at 687. *See also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). The presumption of competence is rebutted by a showing of factual errors unreasonable under prevailing professional norms. The appellant bears the burden of establishing that his trial defense counsel were ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

Here, the appellant's trial defense counsel knew or should have known of the defects in the government's disposition of the first two sets of charges. The appellant's trial defense team was aware that Capt D withdrew the original charges, and the second Article 32 report, along with its recycled witness testimony and conclusions, was served on the appellant's counsel on 19 August 2002. The briefs and

arguments of counsel show that both sides understood the speedy trial issue hinged on whether the government had properly dealt with the earlier charges. Indeed, more than half of the trial transcript revolves around the speedy trial motion and related discovery matters. This issue was not peripheral to the appellant's defense: it *was* his defense.

According to a post-trial affidavit filed by the appellant's military trial defense counsel, the defense team was hampered in proving their speedy trial claims "without . . . all of the preferral and referral documents" which, he reports, the SJA "would not allow us to review." Yet the trial defense counsel did not move to compel production of those documents, either in the initial Article 39(a) session or in the months that followed between the appellant's arraignment and trial. Instead, according to the appellant's military trial defense counsel, they passively waited for "appellate discovery." Nor did the trial defense team address the government's failure to start anew, as required by *Britton*, after the purported dismissal of the 2001 charges.

"Familiarity with the facts and applicable law are fundamental responsibilities of defense

counsel." *Davis*, 60 M.J. at 475. The trial defense team here had ample time to address the government's pocketing of the original charges and to compare the trial counsel's "de facto dismissal" claims with the government's post-"dismissal" conduct. The record shows that the trial defense team was so fixated on proving that the SJA deliberately misled the convening authority about *why* the charges should be disposed of that they clearly neglected the more fundamental question: Did the government actually dispose of the charges at all? There was no reasonable strategic or tactical reason for such neglect. The performance of the trial defense team "fell measurably below the performance standards ordinarily expected of fallible lawyers." *See Polk*, 32 M.J. at 153.

Prejudice

On finding that the trial defense team erred, this Court would ordinarily turn to the question of prejudice, asking whether there is a reasonable probability that, absent the error, the appellant would have received a better result. *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000). The remedy for a violation of R.C.M. 707 is dismissal of the affected charges. Had the trial defense team focused on fundamentals, it is

reasonably probable that they would have secured such a result.

Dismissal under R.C.M. 707 may be with or without prejudice. Factors to be considered include the seriousness of the offenses, the facts and circumstances leading to the dismissal, the impact of a re-prosecution on the administration of justice, and any prejudice resulting to the accused from the denial of his right to a speedy trial. R.C.M. 707(d). Where appropriate, we rely on the military judge's findings of fact, but otherwise evaluate these factors de novo. *United States v. Cooper*, 58 M.J. 54, 57-58 (C.A.A.F. 2003). The military judge made no findings on the first three R.C.M. 707(d) factors; but examining the record in its entirety, each either favors dismissal with prejudice or is neutral.

Three of the four offenses to which the appellant pled guilty (failure to properly secure his privately-owned firearms for his last day of training, using a government computer to conduct online business, and filing a false travel voucher) are legitimate offenses under the UCMJ, but none are so serious as to demand trial by court-martial as their only disposition. In fact, the appellant was originally offered nonjudicial punishment for the travel voucher offense under Article 15, UCMJ, 10 U.S.C. §

815, but that action was withdrawn when the additional investigation got underway. The final charge, which alleges that the appellant, a Security Forces noncommissioned officer, wrongfully possessed an instrument purporting to be "Security Police" credentials, does not, on its face, appear to be a serious offense -- if indeed it is an offense at all.[15]

The facts and circumstances supporting dismissal for speedy trial violations in this case are grounded entirely in the government's persistent ineptitude. Having preferred charges against the appellant no less than four times already, the government should not rightfully be heard to complain about being denied a fifth bite at the apple. Nor would there be any negative impact on the administration of justice in bringing this case, finally, to a close.

Concerning the final R.C.M. 707(d) factor, prejudice to the appellant: The military judge found that both the appellant and his family were adversely impacted by the lengthy delay. Relying on this Court's decision in *United States v. Plants*, 57 M.J. 664 (A.F. Ct. Crim. App. 2002), *aff'd*, 62 M.J. 397 (C.A.A.F. 2005), he initially concluded that this impact was not

enough to warrant a finding of prejudice. Subsequent to that ruling, after hearing further evidence, the military judge found that the appellant was subjected to "punitive" conditions of restraint while awaiting trial. *See United States v. Dooley*, 61 M.J. 258, 264-65 (C.A.A.F. 2005); *see also Plants*, 57 M.J. at 667 (citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972) (speedy trial right intended to prevent prejudice in the form of "oppressive" conditions)). Taking this additional finding into account, along with the appellant's unrebutted testimony that he lost his civilian job while being kept at Peterson AFB awaiting trial,[16] a majority of this Court -- while disagreeing as to the validity of the government's "de facto dismissal" claims -- agree that the appellant was prejudiced by the lengthy delay in bringing him to trial.

Conclusion

For all of the foregoing reasons, I respectfully dissent.

[15] The appellant was also charged with forging such credentials, but the appellant pled not guilty to that offense and the government did not attempt to prove it.

16 This factor was not considered in the military judge's ruling, although he did consider evidence that, owing to the lengthy trial delay, the appellant was not promoted in a subsequent job.